

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU, a Minor by and through
MRS. KAM WAI LAU, his Guardian ad Litem, ET AL.,
Petitioners,

vs.

ALAN H. NICHOLS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

- March 25, 1970— Plaintiffs' Complaint for Injunction and Declaratory Relief filed in United States District Court for the Northern District of California.
- April 8, 1970 — Order to Show Cause issued.
- April 17, 1970— Plaintiffs propound Interrogatories to Defendants.
- April 27, 1970— Defendants' Motion to Dismiss filed.
- May 4, 1970 — Defendants' affidavits of Wellington Chew, Yvon Johnson, and Isadore Pivnick filed.
- May 12, 1970 — Stipulation entered into by Plaintiffs and Defendants.
- May 26, 1970 — Defendants' Answer to Complaint for Injunction and Declaratory Relief filed.
- May 26, 1970 — Defendants' affidavit of Edward D. Goldman filed.
- May 26, 1970 — Defendants' Answers to Interrogatories propounded by Plaintiffs filed.
- May 26, 1970 — Plaintiffs' affidavit of Edward H. Steinman filed.
- May 26, 1970 — Plaintiffs' Exhibits Numbers 1-8 admitted into evidence.
- May 26, 1970 — Order of United States District Court for Northern District of California entered.

- June 22, 1970 — Plaintiffs' Notice of Appeal filed.
- Jan. 8, 1973 — Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered.
- June 11, 1973 — Order of Supreme Court of United States granting petition for writ of certiorari and motion for leave to proceed *in forma pauperis* entered.
- June 18, 1973 — Supplemental Order of the United States Court of Appeals for the Ninth Circuit entered.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627LHB

KINNEY KINMON LAU, a Minor by and through MRS. KAM WAI LAU, his Guardian ad Litem; DAVID LEONG, a Minor by and through YUE BEW LEONG, his Guardian ad Litem; JOAN YEE, a Minor by and through MRS. FUNG YEE YEE, her Guardian ad Litem; PAULETTE CHEUNG, a Minor by and through KUN CHEUNG, her Guardian ad Litem; JUDY SUN, a Minor by and through MRS. JULIA SUN, her Guardian ad Litem; WAILY TOM, a Minor by and through MRS. CHOI KAM TOM, his Guardian ad Litem; KAREN YEE, a Minor by and through MRS. FUNG YEE YEE, her Guardian ad Litem; KAREN CHIU, a Minor by and through MRS. MOY HOR CHIU, her Guardian ad Litem, and DAVID SUN, a Minor by and through MRS. JULIA SUN, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated,

KIT LING LEE, a Minor by and through HENRY LEE, her Guardian ad Litem; STANLEY CHEUNG, a Minor by and through KUN CHEUNG, his Guardian ad Litem; SAI CHONG LEE, a Minor by and through HENRY LEE, his Guardian ad Litem; and SAI HO LEE, a Minor by and through HENRY LEE, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

vs.

ALAN H. NICHOLS, President, and DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMROVSKI, DR. DAVID J. SANCHEZ, JR., in their official capacities as members of the Board of Education of the San Francisco Unified School District; DR. ROBERT E. JENKINS, Superintendent of the San Francisco Unified School District; and MRS. DIANNE FEINSTEIN, President, and

JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA, TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES MAILLIARD, ROBERT H. MENDELSON, RONALD PELOSI, PETER TAMARAS, MRS. DOROTHY VON BEROLDINGEN, in their official capacities as members of the Board of Supervisors of the City and County of San Francisco, DEFENDANTS

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF
(Civil Rights)—Filed March 25, 1970

I

PRELIMINARY STATEMENT

1. This action, brought under 28 U.S.C. §§ 1331, 1343 (3) (4), seeks to provide plaintiffs and all others similarly situated with their right to an education. Such a fundamental right is guaranteed by the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature.

2. At present, plaintiffs and *at least* 2,850 other Chinese-speaking students languish in San Francisco Unified School District classrooms, unable to either understand or communicate in the English language. None of these thousands of students reads, speaks, or comprehends the English language sufficiently to function in the classroom, let alone to function in this society.

3. Of these students, nearly two-thirds—or at least 1,800 Chinese-speaking students—receive no special instruction or help in English. These students, who comprise the first class of plaintiffs in this action, are completely denied any opportunities to benefit from the educational curriculum.

4. The other 1,050 Chinese-speaking students do receive some special instruction in the English language. Yet, most of these students—of whom the second class of plaintiffs in this action is representative—are taught only by non-Chinese speaking teachers. In addition, only one-half of these students receive such instruction in full-time, specially designed classes. The rest receive part-

time instruction, for less than one hour per day, taught by regular classroom teachers, parents, and volunteers.

5. Defendants' failure to provide plaintiffs and nearly 3,000 other Chinese-speaking students with special, full-time instruction in English, taught by bilingual teachers, deprives them of both an education and equal educational opportunities. Since regular classes are taught exclusively in English, they cannot understand any of what transpires. Since English is the dominant language in this society, they are—and will be—severely disadvantaged in competing for employment, housing, higher education, and the like. For many, the defendants' denial of an education dooms them inevitably to become dropouts and to join the rolls of the unemployed.

6. This action, therefore, seeks injunctive and declaratory relief to prevent the deprivation of plaintiffs' rights to an education. Such deprivation violates plaintiffs':

(a) Rights to an education under the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States, under Article IX, Section 5 of the Constitution of the State of California, and under California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, 12101;

(b) Rights to equal protection of the laws and equal educational opportunities under the Fourteenth Amendment of the Constitution of the United States and under Article I, Sections 11 and 21, and Article IV, Section 25, of the Constitution of the State of California;

(c) Rights to equal educational opportunities under the Civil Rights Act of 1964 (codified in 42 U.S.C. §§ 2000d, 2000d-1);

(d) Rights to learn English, as demonstrated in Article II, Section 11, and Article IV, Section 24 of the Constitution of the State of California, in California Education Code §§ 71, 5766, 5770, 5779, 6060, 6450, 6499.200, 6750, 8551(a), 8571(a), 8573, 12820, and in California Code of Civil Procedure §§ 185, 198 (2) (3); and

(e) Rights to receive special instruction in English from bilingual teachers, proficient in the plaintiffs' native language, as demonstrated in California Education Code §§ 71, 5766, 6457, 13187.6.

II

JURISDICTION

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 and by 28 U.S.C. §§ 1343(3)(4), which provide original jurisdiction in suits authorized by 42 U.S.C. § 1983. The amount in controversy in this action exceeds the sum of \$10,000, exclusive of interests and costs.

2. Declaratory judgments are authorized by 28 U.S.C. §§ 2201 and 2202.

III

PLAINTIFFS

1. Plaintiffs KINNEY KINMON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN and all others similarly situated [hereinafter referred to as "First Class of Plaintiffs"] are all Chinese-speaking children residing in San Francisco, California, who suffer from defendants' actions complained of herein. Members of the First Class of Plaintiffs are enrolled in free public elementary and secondary schools administered and maintained by defendants. Neither the named plaintiffs nor other members of the First Class of Plaintiffs can read or write or speak English. Furthermore, none receive any special instruction in English, though they attend regular classes at their respective schools for over six hours each school day.

(a) Plaintiff KINNEY KINMON LAU resides at 740 Broadway, San Francisco, California, with his mother, Guardian ad Litem MRS. KAM WAI LAU, and father. He is six years old and is enrolled in regular classes in the first grade at Jean Parker School.

(b) Plaintiff DAVID LEONG resides at 848 Stockton, San Francisco, California, with his father, Guardian ad Litem YUE BEW LEONG, and mother. He is 14 years old and is enrolled in regular classes in the seventh grade at Marina Junior High School.

(c) Plaintiff JOAN YEE resides at 1407 Mason, San Francisco, California, with her mother, Guardian ad Litem MRS. FUNG YEE YEE, and father. She is nine years old and is enrolled in regular classes in the third grade at Jean Parker School.

(d) Plaintiff PAULETTE CHEUNG resides at 340 Willard, San Francisco, California, with her father, Guardian ad Litem KUN CHEUNG, and mother. She is 14 years old and is enrolled in regular classes in the eighth grade at Roosevelt Junior High School.

(e) Plaintiff JUDY SUN resides at 1517 Taylor, San Francisco, California, with her mother, Guardian ad Litem MRS. JULIA SUN, and father. She is seven and one-half years old and is enrolled in regular classes in the second grade at Jean Parker School.

(f) Plaintiff WAILY TOM resides at 654 Jackson, San Francisco, California, with his mother, Guardian ad Litem MRS. CHOI KAM TOM. He is six years old and is enrolled in regular classes in the first grade at Commodore-Stockton School.

(g) Plaintiff KAREN YEE resides at 1407 Mason, San Francisco, California, with her mother, Guardian ad Litem MRS. FUNG YEE YEE, and father. She is eight years old and is enrolled in regular classes in the second grade at Jean Parker School.

(h) Plaintiff KAREN CHIU resides at 1916 1/2 Mission, San Francisco, California, with her mother, Guardian ad Litem MRS. MOY HOR CHIU, and father. She is 11 years old and is enrolled in regular classes in the sixth grade at Marshall School.

(i) Plaintiff DAVID SUN resides at 1517 Taylor, San Francisco, California, with his mother, Guardian ad Litem MRS. JULIA SUN, and his father. He is six and one-half years old and is enrolled in regular classes in the first grade at Jean Parker School.

2. Plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, and SAI HO LEE and all others similarly situated [hereinafter referred to as "Second Class of Plaintiffs"] are all Chinese-speaking children residing in San Francisco, California, who suffer from defendants' actions complained of herein. Members of the Sec-

ond Class of Plaintiffs are enrolled in free public elementary and secondary schools administered and maintained by defendants. Neither the named plaintiffs nor other members of the Second Class of Plaintiffs can read or write or speak English. Unlike members of the First Class of Plaintiffs, members of the Second Class of Plaintiffs do receive some special instruction in English. Yet, this instruction is taught only by non-Chinese speaking teachers and generally on a part-time basis only.

(a) Plaintiff KIT LING LEE resides at 3133 16th Street, San Francisco, California, with her father, Guardian ad Litem HENRY LEE, and mother. She is six years old and is enrolled in regular classes in the second grade at Marshall Annex School.

(b) Plaintiff STANLEY CHEUNG resides at 340 Willard, San Francisco, California, with his father, Guardian ad Litem KUN CHEUNG, and mother. He is nine years old and is enrolled in regular classes in the third grade at Lafayette School.

(c) Plaintiff SAI CHONG LEE resides at 3133 16th Street, San Francisco, California, with his father, Guardian ad Litem HENRY LEE, and mother. He is 11 years old and is enrolled in regular classes in the sixth grade at Marshall School.

(d) Plaintiff SAI HO LEE resides at 3133 16th Street, San Francisco, California, with his father, Guardian ad Litem Henry Lee, and mother. He is eight years old and is enrolled in regular classes in the third grade at Marshall School.

IV

DEFENDANTS

1. Defendants ALAN H. NICHOLS, President, and DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIEN-THAL, HOWARD N. NEMEROVSKI, and DR. DAVID J. SANCHEZ, JR., are members of the Board of Education of the San Francisco Unified School District. In their official capacities as Board members, they are re-

sponsible—under laws enacted by the California State Legislature—for maintaining and administering all elementary and secondary public schools within the City and County of San Francisco.

2. Defendant DR. ROBERT E. JENKINS is Superintendent of the San Francisco Unified School District. As such, he is responsible for administering the elementary and secondary public schools within the City and County of San Francisco.

3. Defendants MRS. DIANNE FEINSTEIN, President, and JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA, TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES MAILLIARD, ROBERT H. MENDELSON, RONALD PELOSI, PETER TAMARAS, and MRS. DOROTHY VON BEROLDINGEN are members of the Board of Supervisors of the City and County of San Francisco. In their official capacities as Supervisors, they have overall responsibility—under laws enacted by the California State Legislature—for operation of all elementary and secondary public schools within the City and County of San Francisco.

V

STATEMENT OF THE CLAIM

1. Education for children between the ages of six and 16 is no longer a mere privilege, but a legally enforceable right. Such a right to an education now exists under the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, under Article IX, Section 5 of the Constitution of the State of California, and under California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, and 12101.

2. The right to an education in the State of California assumes the right to learn English, the dominant language. Since regular classes are taught exclusively in English, plaintiffs and all others similarly situated must be able to sufficiently speak, understand, read, and write the English language to both benefit from the educational curriculum and function effectively in the classroom.

3. Furthermore, to function effectively in the society at large, plaintiffs and all others similarly situated must possess a command of the English language. Without such command, they will be severely disadvantaged in competing for employment, housing, higher education, and the like. Without such knowledge of English, they will be unable to exercise their right to vote (Article II, Section 11 of the Constitution of the State of California); unable to serve as jurors (California Code of Civil Procedure § 198(2)(3)); unable to graduate from a California high school (California Education Code § 8573); and unable even to comprehend the pleadings and other aspects of this action (Article IV, Section 24 of the Constitution of the State of California; California Code of Civil Procedure § 185).

4. The right—as well as the need—to learn English in school has been especially recognized by the State of California. Section 71 of the California Education Code provides an explicit State policy to “insure the mastery of English by all pupils in the schools.” Thus, English is a required course of study in all elementary and secondary grades in California. California Education Code §§ 8551(a), 8571(a).

5. To implement and strengthen its policy to “insure the mastery of English,” the California State Legislature has enacted numerous programs, including the Special Elementary School Reading Instruction Program (California Education Code §§ 5770, *et seq.*); Special Programs or Classes in English for Elementary School Pupils (California Education Code §§ 6060, *et seq.*); the Special Compensatory Educational Programs for Disadvantaged Children (California Education Code §§ 6450, *et seq.*); the Educational Improvement Act of 1969 (California Education Code § 6499.200); and the Educationally Handicapped Minors Program (California Education Code §§ 6750, *et seq.*). See also Title I of the Elementary and Secondary Education Act of 1965 (codified in 20 U.S.C. § 241).

6. In addition, the State of California has recognized that non-English speaking children will master English only through bilingual instruction. In seeking to “insure

the mastery of English," Section 71 of the California Education Code explicitly encourages bilingual instruction "in those situations when such instruction is educationally advantageous." Similarly, both the Bilingual Education Demonstration Program of 1969 (California Education Code § 5766) and Sections 6457 and 18187.6 of the Education Code were enacted

to encourage bilingual instruction in order [that non-English speaking students] develop a greater proficiency in English in accordance with the general policy specified in Section 71 of the Education Code.

Title VII of the Elementary and Secondary Act of 1965, which focuses on bilingual education, was enacted for the very same reasons. 20 U.S.C. § 241.

7. Currently, defendants admit that approximately 2,850 Chinese-speaking students enrolled in the San Francisco Unified School District are unable to sufficiently speak, understand, read, or write the English language to function in a regular classroom. The figure of 2,850 Chinese-speaking students is taken from a December, 1969 survey of San Francisco elementary and secondary students needing special help in English. The survey was conducted, in part, by the Chinese Bilingual Education Program of the Board of Education of the San Francisco Unified School District.

8. Of these 2,850 Chinese-speaking students, the survey shows 1,800—including plaintiffs KINNEY KIN-MON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN, and other members of the First Class of Plaintiffs—receive no special instruction or help in English.

9. The other 1,050 Chinese-speaking students reported in the survey do receive some special help in English. For most of these students—including plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, SAI HO LEE, and other members of the Second Class of Plaintiffs—such help is given by non-Chinese speaking teachers. For all 1,050 students, their placement in the

limited number of special classes is arbitrary, based on neither testing procedures nor ascertainable standards.

10. Furthermore, only one-half of these 1,050 students receive such instruction in full-time, specially designed classes. These classes are administered by the Chinese Bilingual Education Program. For the other one-half of these 1,050 students, special instruction lasts less than one hour a day, is part of the regular curriculum, and is taught by regular classroom teachers, parents, and volunteers.

11. The facts demonstrate that plaintiffs in both classes receive in fact no education and no program of instruction. To deprive 1,800 Chinese-speaking students in the First Class of Plaintiffs of any special instruction in English is to deprive them of an education. Likewise, to give members of the Second Class of Plaintiffs such instruction, but taught by non-Chinese speaking teachers and generally for only 50 minutes a day, is also tantamount to no education.

12. Further, plaintiffs contend defendants' survey results of 2,850 "needy" students grossly under-estimates the actual number needing special instruction in English. In November of 1967, defendant DR. ROBERT E. JENKINS reported that 2,455 Chinese-speaking students needed special instruction in English. Since then, *at least* 2,000 newly-arrived immigrants who speak only Chinese have entered San Francisco schools, needing special instruction in English. Yet, incredibly, the December of 1969 survey reflects only an increase of 400 Chinese-speaking students needing special help in English since November of 1967.

13. Nevertheless, plaintiffs are aware that exact figures are not crucial. What is crucial is that thousands of Chinese-speaking students are not receiving any special instruction in English. And, it is further significant that of those 1,050 students receiving such instruction, most receive no benefit due to non-Chinese speaking teachers and to limited help given by untrained teachers. Hence, these students in both the First and Second Classes of Plaintiffs are being denied their rights to an education, rights guaranteed by the Constitution of the United

States, the Constitution of the State of California, and laws enacted by the California State Legislature.

14. Plaintiffs further allege defendants have long been aware of this denial of plaintiffs' rights to an education, but have refused to take any steps to remedy it. As already demonstrated, defendant JENKINS more than two years ago reported 2,455 Chinese-speaking students in the public schools needed special instruction in English. At the time of that report, less than one-fifth of these students—473—were receiving such full-time instruction, primarily from non-Chinese speaking teachers.

15. In addition, plaintiffs contend the deprivation of the rights to an education among Chinese-speaking students is worsening. The school district's Chinese Bilingual Education Program estimates more than 1,000 Chinese-speaking immigrant students enter San Francisco public schools each year. Of these newly-arrived students, the Program reports more than 90 percent need special instruction in English.

16. Again, plaintiffs contend defendants' figure of 1,000 students grossly under-estimates the actual number of Chinese-speaking immigrant students annually entering the schools. The Economic Opportunity Council of San Francisco, Program Unit Office, estimates 5,000 Chinese immigrants now settle annually in San Francisco. Plaintiffs contend at least one-third of these Chinese immigrants—1,670—are school-age children entering San Francisco schools.

17. But, whatever the annual figure of Chinese-speaking immigrants entering the schools, defendants have made no plans to cope with the situation. In fact, the Chinese Bilingual Education Program of the Board of Education of the San Francisco Unified School District estimates its 1970-71 budget request will provide special full-time instruction to only 630 Chinese-speaking students. Even if the Program receives every cent requested, defendants will be denying such help to thousands of needy Chinese-speaking students. Since the parents of these students can neither read nor write nor speak English, these thousands of students will be unable to compensate for this deprivation away from school.

VI

BASIS OF CLASS ACTION

1. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all others similarly situated.

2. The First Class of Plaintiffs, represented by plaintiffs KINNEY KINMON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN, consists of all Chinese-speaking children attending the free public elementary and secondary schools of the San Francisco Unified School District, who need special instruction in English from defendants and are not receiving any such instruction.

3. The Second Class of Plaintiffs, represented by plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, and SAI HO LEE, consists of all Chinese-speaking children attending the free public elementary and secondary schools of the San Francisco Unified School District, who are receiving some special instruction in English from defendants, but are taught only by non-Chinese speaking teachers.

4. Plaintiffs KINNEY KINMON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN bring this action as a class action for the following reasons:

(a) The questions of law and fact are common to plaintiffs and the First Class of Plaintiffs they represent;

(b) The members of the First Class of Plaintiffs are so numerous as to make joinder impracticable;

(c) The claims of the plaintiffs are typical of the claims of all members of the First Class of Plaintiffs;

(d) The plaintiffs fairly and adequately represent the claims of all members of the First Class of Plaintiffs;

(e) The defendants are acting on grounds generally applicable to the entire First Class of Plaintiffs;

(f) The questions of law and fact common to the First Class of Plaintiffs predominate over any questions affecting individual members; and

(g) A class action will best provide a fair and efficient adjudication of the important issues at stake here.

5. Plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, and SAI HO LEE bring this action as a class action for the following reasons:

(a) The questions of law and fact are common to plaintiffs and the Second Class of Plaintiffs they represent;

(b) The members of the Second Class of Plaintiffs are so numerous as to make joinder impracticable;

(c) The claims of the plaintiffs are typical of the claims of all members of the Second Class of Plaintiffs;

(d) The plaintiffs fairly and adequately represent the claims of all members of the Second Class of Plaintiffs;

(e) The defendants are acting on grounds generally applicable to the entire Second Class of Plaintiffs.

(f) The questions of law and fact common to the Second Class of Plaintiffs predominate over any questions affecting individual members; and

(g) A class action will best provide a fair and efficient adjudication of the important issues at stake here.

VII

FIRST CAUSE OF ACTION

As a FIRST CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through VI of this complaint, and further allege:

1. Plaintiffs and all others similarly situated have a right to an education under the Fifth Amendment, the Ninth Amendment, and the Fourteenth Amendment of the Constitution of the United States, under Article IX, Section 5 of the Constitution of the State of California, and under California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, and 12101.

2. By not providing members of the First Class of Plaintiffs with any special instruction in English, de-

fendants are depriving them of an education. By not providing members of the Second Class of Plaintiffs with special instruction taught by Chinese-speaking teachers in full-time, specially designed classes, defendants are depriving them of an education.

3. Such deprivation to members of both classes constitutes a clear violation of their rights to an education, in violation of the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States, Article IX, Section 5 of the Constitution of the State of California, and California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, and 12101.

VIII

SECOND CAUSE OF ACTION

As a SECOND CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through VII of this complaint, and further allege:

1. In maintaining the San Francisco Unified School District, defendants are required—both by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and by Article I, Sections 11 and 21, and Article IV, Section 25 of the Constitution of the State of California—to discharge their responsibility on substantially an equal basis to all children in the District.

2. As a result of defendants' actions, substantial disparities exist in the quality and extent of availability of educational opportunities in the San Francisco Unified School District. The educational opportunities made available to members of both classes are substantially inferior and unequal to the educational opportunities made available to the nearly 100,000 other students in the District.

3. Defendants' actions in denying plaintiffs and all others similarly situated equal educational opportunities are arbitrary and completely unrelated to the goal of providing all children with an education. In addition,

such actions cannot be justified in terms of educational needs or demands of plaintiffs or parents for such disparities.

4. By providing unequal educational opportunities defendants are invidiously discriminating against plaintiffs and members of both classes, in violation and deprivation of their rights to equal protection of the laws, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and by Article I, Sections 11 and 21, and by Article IV, Section 25 of the Constitution of the State of California.

IX

THIRD CAUSE OF ACTION

As a THIRD CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through VIII of this complaint, and further allege:

1. As a result of defendants' actions, substantial disparities exist in the quality and extent of availability of educational opportunities among Chinese-speaking students in the District who need special help in English.

(a) The educational opportunities made available to members of the First Class of Plaintiffs—who receive no special instruction at all—are substantially inferior and unequal to the educational opportunities made available to those Chinese-speaking students receiving such instruction.

(b) The educational opportunities made available to members of the Second Class of Plaintiffs—who receive some special instruction taught only by non-Chinese speaking teachers—are substantially inferior and unequal to the educational opportunities made available to those Chinese-speaking students receiving such instruction from bilingual, Chinese-speaking teachers.

2. Defendants' actions in denying members of both classes equal educational opportunities are arbitrary and unjustifiable. Chinese-speaking students receiving equal educational opportunities are arbitrarily assigned to special classes taught by bilingual, Chinese-speaking teach-

ers, with their selection based neither on tests nor any other ascertainable standards.

3. By providing unequal educational opportunities, defendants are invidiously discriminating against plaintiffs and members of both classes, in violation and deprivation of their right to equal protection of the laws, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and by Article I, Sections 11 and 21, and by Article IV, Section 25 of the Constitution of the State of California.

X

FOURTH CAUSE OF ACTION

As a FOURTH CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through IX of this complaint, and further allege:

1. Under the Civil Rights Act of 1964, the United States Congress established a federal right to be protected from discrimination under any program receiving federal monies.

2. Specifically, in Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. § 2000d), the United States Congress promulgated the following law:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. Pursuant to this Section of the Civil Rights Act, regulations were enacted providing that "each school system has an *affirmative duty* to take prompt and effective action to eliminate discrimination based on race . . . or national origin, and to correct the effects of past discrimination." 33 *Fed. Reg.* 4850 (March 23, 1968) (emphasis added).

4. Defendants are receiving federal financial assistance in general to administer and maintain educational pro-

grams and, in particular, to provide Chinese-speaking students special instruction in English taught by bilingual, Chinese-speaking teachers.

5. But, Chinese-speaking students who are members of the First Class of Plaintiffs are not receiving any such special instruction. Likewise, Chinese-speaking students who are members of the Second Class of Plaintiffs are receiving such instruction only from non-Chinese speaking teachers.

6. Therefore, members of both classes are being deprived of their right to an education because of their Chinese ethnicity and—for many—their recent immigration to the United States.

7. Such deprivation excludes members of both classes from participation in, denies them the benefits of, and subjects them to discrimination under educational programs receiving federal financial assistance, in violation of Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. § 2000d).

XI

FIFTH CAUSE OF ACTION

As a FIFTH CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through X of this complaint, and further allege:

1. Plaintiffs allege, on information and belief, that defendants have received funds under Chapter 6.5 of the California Education Code to provide special educational programs for disadvantaged children. California Education Code §§ 6450 *et seq.*

2. In seeking Chapter 6.5 funds, defendants must submit a "comprehensive compensatory education plan." California Education Code § 6457. Such a plan must include:

- (a) Remedial programs for all disadvantaged children;
- (b) Preventive programs, focused on children between the ages of three and eight years, whose goal is

teaching the child to read, awakening the child's interest in learning, giving the child a sense of success in school achievement, preventing the child's alienation from the school, and preventing his possible early departure from school.

- (c) For disadvantaged children who do not speak English, the

programs *should include* early English language instruction, and the use of teachers, teachers' aides or volunteers *who are proficient in the child's primary language*. (Emphasis added).

3. The purpose of a "comprehensive compensatory education plan"—and of the programs under it—is to provide an education and special instruction in English for students like plaintiffs and all others similarly situated. And, as the statute states, such instruction must be given by teachers "proficient in the child's primary language."

4. Defendants have never submitted a "comprehensive compensatory education plan." The plans both drafted and submitted by defendants have never adequately dealt with the English-language deprivation of San Francisco Chinese-speaking students, a deprivation clearly demonstrated by the serious plight of the plaintiffs and all others similarly situated.

5. Therefore, in failing to submit such a "comprehensive compensatory education plan," defendants have violated the explicit requirements of California Education Code § 6457, to the severe detriment of the plaintiffs and all others similarly situated.

XII

SIXTH CAUSE OF ACTION

As a SIXTH CAUSE OF ACTION, the plaintiffs re-allege, as if fully set forth, the allegations set forth in parts I through XI of this complaint, and further allege:

1. Every person in California between the ages of six and 16 years must attend a full-time school. California Education Code § 12101. The purpose of such compulsory full-time education is to assure these individuals reach the minimum threshold of education necessary to function in this society.

2. To fulfill this purpose, the State of California has enunciated a policy that these students master and become competent in the English language. California Education Code § 71. Such a policy reflects the dominance of English in this society. For example, without competence in English, plaintiffs cannot vote (Article II, Section II of the Constitution of the State of California), cannot serve as jurors (California Code of Civil Procedure § 198(2)(3)), and cannot comprehend the laws of this state or even legislative and judicial proceedings (Article IV, Section 24 of the Constitution of the State of California; California Code of Civil Procedure § 185).

3. Accordingly, to implement this policy, the State requires courses in English must be offered to all students in grades one through 12, providing them with "the skills of reading, listening, and speaking." California Education Code §§ 8551 (a) and 8571 (a). Also, programs have been enacted to guarantee that disadvantaged children—such as plaintiffs and all others similarly situated—attain these skills. *E.g.*, California Education Code §§ 5766, 5770, 6060, 6450, 6499.200, 6750. Likewise, testing programs are required to evaluate the English competence of these students. *E.g.*, California Education Code §§ 5779, 12820. Finally, to graduate from high school, students must possess basic skills in English. California Education Code § 8573.

4. By not providing members of both classes their rights to an education to learn English, defendants render irrational the compulsory education requirements of California Education Code § 12101.

5. Furthermore, by not providing members of both classes with special instruction in English taught by bilingual teachers, defendants are violating and depriving them of rights guaranteed by the explicit mandates of Article II, Section 11, and Article IV, Section 24, of

the Constitution of the State of California, of California Education Code §§ 71, 5766, 5770, 5779, 6060, 6450, 6499.200, 6750, 8551 (a), 8571 (a), 8573, 12820, and of California Code of Civil Procedure §§ 185, 198 (2) (3).

XIII

SEVENTH CAUSE OF ACTION

As a SEVENTH CAUSE OF ACTION, the plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through XII of this complaint, and further allege:

1. It is the policy of the State of California that school districts, including the San Francisco Unified School District, "develop programs that will best fit the needs and interests of the pupils." California Education Code § 7502.
2. The State of California has further stated that non-English speaking children will master English most effectively and swiftly through programs of bilingual instruction. California Education Code §§ 71, 5766, 6457, 13187.6. In fact, that California State Legislature explicitly advocates "bilingual instruction in order [that non-English speaking students] develop a greater proficiency in English in accordance with the general policy specified in Section 71 of the Education Code." California Education Code § 5766 (3).
3. By not providing members of both classes with special instruction taught by bilingual teachers, defendants are both violating the explicit requirements of California Education Code § 7502 and depriving plaintiffs and all others similarly situated of bilingual instruction in English, guaranteed by California Education Code §§ 71, 5766, 6457, 13187.6.

XIV

BASIS FOR INJUNCTIVE RELIEF

1. Plaintiff and members of both classes they represent will suffer irreparable injury if immediate action is

not taken to guarantee them their rights to an education. Such a fundamental right to education is guaranteed by the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature. Unless plaintiffs receive their rights, they will continue to suffer the immediate and irreparable harm of no education and unequal educational opportunities and, hence, will be unable to function effectively in both the classroom and society.

2. Plaintiffs and members of both classes they represent will also suffer irreparable injury unless this Court takes immediate and prompt action. Preparation by defendants for special instruction in English taught by bilingual, Chinese-speaking teachers may take some time to develop and implement. Before plaintiffs and members of both classes receive their rights, personnel may have to be hired, space and special materials acquired, and testing of all children performed.

3. No previous application for the relief sought herein has been made to this or any other Court.

4. No adequate remedy at law is available to plaintiffs or members of both classes they represent.

WHEREFORE, plaintiffs respectfully pray, on behalf of themselves and on behalf of all members of both the First Class of Plaintiffs and Second Class of Plaintiffs, that this Court:

1. Issue preliminary and permanent injunctions enjoining defendants from refusing to provide plaintiffs and all others similarly situated with an education and with equal educational opportunities, in violation of the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature.

2. Issue preliminary and permanent injunctions enjoining defendants from refusing to provide plaintiffs and all others similarly situated with special instruction in English, taught by bilingual teachers, without which plaintiffs and all others similarly situated will continue to be denied an education and denied educational opportunities equal to students whose native language is English.

3. Issue preliminary and permanent injunctions requiring defendants to institute a testing program—with-

in a reasonable time not to exceed 30 days—to assess the capabilities of all Chinese-speaking students in all elementary and secondary grades to speak, read, and write the English language, in order to rationally assign students to special classes in English taught by bilingual teachers.

4. Issue preliminary and permanent injunctions requiring defendants to implement a program—within a reasonable time not to exceed September 1, 1970—of special instruction in English for Chinese-speaking students, taught by bilingual teachers, in order to provide plaintiffs and all others similarly situated with their rights to an education and to equal educational opportunities.

5. Enter a declaratory judgment declaring defendants' failure to provide plaintiffs and all others similarly situated with special instruction in English, taught by bilingual teachers, is in violation of the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature.

6. Order such other and further relief as the Court deems appropriate.

Dated: March 23, 1970.

WONG, BERGGREN & SIEDMAN
EDWARD H. STEINMAN

By /s/ Edward H. Steinman
Attorney for Plaintiffs

[Affidavit of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

[Title Omitted]

INTERROGATORIES PROPOUNDED BY PLAINTIFFS TO DEFENDANTS ALAN H. NICHOLS, DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., ROBERT E. JENKINS—Filed April 17, 1970

TO: DEFENDANTS ALAN H. NICHOLS, President, DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., in their official capacities as members of the Board of Education of the San Francisco Unified School District, to defendant ROBERT E. JENKINS, Superintendent of the San Francisco Unified School District, and to IRVING BREYER, their attorney of record:

Plaintiffs request that defendants, and each of them, answer the following interrogatories, separately and fully, in writing and under oath, pursuant to Rule 33 of the Federal Rules of Civil Procedure and all applicable sections of said Rules. The answers should be signed by persons making them and must be served on plaintiffs within 15 days after service of these interrogatories.

In answering these interrogatories, furnish all information which is available to you, including information in the possession of your attorney and not merely such information known of your knowledge. Furthermore, for every question, identify the source material and/or materials upon which your answer is based.

If you cannot answer the following interrogatories in full, after exercising due diligence to secure the information called for, so state, and answer the questions to the extent possible, specifying your inability to answer

the remaining portions and stating whatever information or knowledge you have concerning the unanswered portions.

In addition, for Interrogatories No. 1, 2, 3, 4, 5, 6, and 7—which includes all the sub-interrogatories asked in each of the aforementioned interrogatories—please provide the requested information for the school years 1967-68, 1968-69, and 1969-70.

1. What is the total number of students enrolled in regular classes administered by the Board of Education of the San Francisco Unified School District? [For purposes of this interrogatory and every subsequent interrogatory, the terms "regular classes" and "students" refer only to daytime programs administered by the Board of Education of the San Francisco Unified School District. Hence, adult education programs, evening programs, summer programs, and the like are not to be included within the scope of your answers.]

a. How many of these students are of Chinese ethnicity?

2. State the name of each school administered by the Board of Education of the San Francisco Unified School District [hereinafter referred to as "the School District"].

a. State the number of Students enrolled in classes at *each* of these schools.

b. State the number of students of Chinese ethnicity enrolled in classes at *each* of these schools.

c. State the number of students of Chinese ethnicity enrolled in *each* grade (from grade kindergarten to grade 12) at *each* of these schools.

3. Concerning your answer to Interrogatory No. 2b, how many of these students of Chinese ethnicity have deficiencies in the English language [for purposes of these interrogatories, "deficiencies in the English language" shall mean "need special instruction in English," which is the standard utilized by the School District]?

a. From what information, surveys, tests, etc., is your answer to Interrogatory No. 3 based?

1. When was such information, survey, test, etc. taken?
 2. How was such information, survey, test, etc., taken? Include in your answer the methods and criteria utilized in taking such information, surveys, tests, etc.
- b. Are there any written documents reflecting the results of the information, surveys, tests, etc. from which your answer to Interrogatory No. 3 is derived?
1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
4. Give a school-by-school and grade-by-grade breakdown of those students of Chinese ethnicity who need special instruction in English.
- a. Are there any written documents reflecting the information, surveys, tests, etc., from which your answer to Interrogatory No. 4 is derived?
1. If there are such documents, please attach a copy of them to your answer to these interrogatories.
5. Describe in detail what special instruction in English is being given to those students of Chinese ethnicity listed in your answer to Interrogatory No. 3. Please include in your answer the following:
- a. How many students of Chinese ethnicity needing special instruction in English actually receive any instruction?
 - b. Concerning your answer to Interrogatory No. 5a, please give a school-by-school and grade-by-grade breakdown of those students of Chinese ethnicity who receive any special instruction in English.
 - c. State how many hours a day each of those students listed in your answer to Interrogatory No. 5a receive special instruction in English.

- d. State how many teachers provide such special instruction and how many of these teachers are fluent in both English and Chinese.
- e. Explain what "special instruction in English" actually constitutes; i.e., describe the methods utilized, the goals sought, and the achievements realized.
- f. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 5 through 5e are derived?
 1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
6. What is the role of the Chinese Bilingual Education Program of the School District?
 - a. How many Chinese students needing special instruction in English does this Program service?
 - b. How many classes are supervised by this Program?
 1. How many hours a day do these classes meet?
 - c. How many teachers are under the supervision of the Chinese Bilingual Education Program?
 1. How many of these teachers are bilingual (i.e., how many are fluent in both Chinese and English)?
 - d. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 6 through No. 6c are derived?
 1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
7. What is the school budget under which the School District operates?
 - a. How much of this budget is spent for special instruction in English for students of Chinese ethnicity?

1. Please break down your answer to Interrogatory No. 7a into the following parts:
 - (a) How much is spent for teacher salaries?
 - (b) How much is spent on materials and textbooks?
 - (c) How much is spent on curriculum development?
 - (d) How much is spent for summer programs providing special instruction in English?
- b. From what sources do these monies spent on special instruction in English for students of Chinese ethnicity come?
- c. Has the School District applied to the United States government and State of California for funds for special instruction in English for students of Chinese ethnicity?
 1. If so, describe in detail when these applications were made, to whom they were made, for what purposes the funds were sought, and what action was taken by the respective governmental agencies concerning the School District's applications.
 2. Please attach copies of these applications and the written responses of the respective governmental agencies to your answers to these interrogatories.
- d. If the School District has either not applied to governmental agencies for such funds or has applied only on a limited and narrow basis, please explain the reasons behind the School District's actions and/or inactions.
 1. Has the School District been unable to meet the eligibility requirements to qualify for funding under these federal and state governmental programs? If so, explain in detail the problems and difficulties posed by such eligibility requirements.

e. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to interrogatories No. 7 through No. 7d are derived?

1. If there are such documents, please attach a copy of them to your answers to these interrogatories.

8. For the 1970-71 school year, describe what you anticipate will be the scope of programs providing special instruction in English to students of Chinese ethnicity. Include in your answer the following:

a. How many students of Chinese ethnicity will be given special instruction in English?

b. How many teachers will give such instruction?

1. How many of these teachers will be bilingual (fluent in both Chinese and English)?

c. How many classes will be devoted to special instruction in English for students of Chinese ethnicity?

1. How many hours a day will each of these classes meet?

2. What teaching methods will be employed in these classes?

3. Will any classes be taught via bilingual instruction? If so, explain in detail how many classes will be taught bilingually, what teaching methods will be employed, and what materials and textbooks will be utilized.

d. How much money will be appropriated by the School District for special instruction in English for students of Chinese ethnicity?

1. From what sources will funds for special instruction in English for students of Chinese ethnicity come?

2. How much money has been requested by the Chinese Bilingual Education Department?

e. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 8 through No. 8d are derived?

1. If there are such documents, please attach a copy of them to your answers to these interrogatories.

9. Describe in detail the activities and goals of the School District's Chinese Education Center. Include within your answer the following information:

a. How many students have been enrolled in its classes?

b. How many students have been referred to regular school classes?

c. How many students, who have needed the services of the Center, have been refused such help because of budget and space limitations?

d. How many teachers are employed by the Center?

1. How many of these teachers are bilingual?

e. Describe the methods utilized in teaching the students enrolled at the Center.

1. Is bilingual instruction utilized? If not, explain why.

f. Describe the scope and size of the program at the Center for the 1970-71 school year.

g. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 9 through No. 9f are derived?

1. If there are such documents, please attach a copy of them to your answers to these interrogatories.

10. What efforts has the School District made in recruiting and hiring bilingual teachers proficient in both English and Chinese?

- a. How many such bilingual teachers proficient in both English and Chinese have been hired since the California State Legislature passed the enabling legislation of Section 13187.6 of the California Education Code?
 1. How many bilingual teachers proficient in both English and Chinese have applied for teaching positions with the School District during the following years: 1966, 1967, 1968, 1969, 1970?
11. Of those students of Chinese ethnicity needing special instruction in English (see your answer to Interrogatory No. 8), how many of them are:
 - a. American-born.
 - b. American citizens.
 - c. Immigrants who arrived in this country prior to September of 1968.
 - d. Immigrants who arrived in this country between September of 1968 and September of 1969.
 - e. Immigrants who arrived in this country since September of 1969.
12. If you do not have exact figures to provide answers to Interrogatory No. 11, please give estimates in percentage terms for the questions asked in Interrogatory No. 11.
13. Of those students of Chinese ethnicity receiving special instruction in English (see your answer to Interrogatory No. 5a), how many of them are:
 - a. American-born.
 - b. American citizens.
 - c. Immigrants who arrived in this country prior to September of 1968.
 - d. Immigrants who arrived in this country between September of 1968 and September of 1969.
 - e. Immigrants who arrived in this country since September of 1969.
14. If you do not have exact figures to provide answers to Interrogatory No. 13, please give estimates in

percentage terms for the questions asked in Interrogatory No. 13.

15. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 11 through No. 14 are derived?

a. If there are such documents, please attach a copy of them to your answers to these interrogatories.

16. Describe in detail the scope and activities of the School District's Spanish Bilingual Program. Include in your answer the following:

a. How many Spanish-speaking students in the School District are deficient in English (i.e., need special instruction in English)?

b. How many of these Spanish-speaking students are receiving special instruction in English?

c. How many teachers are employed to provide such special instruction?

1. How many of these teachers are bilingual, being proficient in both Spanish and English?

d. What teaching methods are employed in providing special instruction in English to Spanish-speaking students?

1. Are these students taught via bilingual instruction?

2. If Spanish-speaking students are taught primarily via bilingual instruction, why are not Chinese-speaking students taught primarily via bilingual instruction?

e. Are there any documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 16 through No. 16d are derived?

1. If there are such documents, please attach a copy of them to your answers to these interrogatories.

17. Are students of Chinese ethnicity involved in the School District's "Project Read"?

- a. If so, state how many students of Chinese ethnicity are involved in the program and describe what kind of educational benefit they are receiving.
- b. Are students who do not speak English tested to measure the effectiveness of reading programs such as "Project Read"?
 1. If not, how is the reading proficiency of these non-English-speaking students measured?

Each of the Interrogatories Nos. 1 through 17—including all sub-interrogatories asked within each interrogatory—is deemed to be a continuing interrogatory, and plaintiffs make demand upon defendants that in the event that at any later date defendants obtain any additional facts, or obtain or make any assumptions or reach any conclusions, opinions, or contentions that are different from those set forth in their answers to these interrogatories, that in such case defendants shall amend their answers to said interrogatories promptly and sufficiently prior to any hearing to fully set forth such different facts, assumptions, conclusions, opinions, or contentions.

Furthermore, if defendants do not attach copies of all the writings and documents requested in Interrogatories Nos. 3b, 4a, 5f, 6d, 7c2, 7e, 8e, 15, 16e, please provide the following information concerning each and every one of the above-mentioned documents:

- a. A clear, concise, and detailed description of the documents;
- b. A description of the nature and extent of the documents;
- c. What individual or individuals have custody of the documents;
- d. Describe the condition and state of the document in a clear, concise, and detailed manner; and
- e. Indicate the exact location of this document including, but not limited to, the following facts:
 - (1) The address of the building in which the documents are located;
 - (2) The room or rooms in which the documents are located; and

(3) The actual container of the document, such as a safe, filing cabinet, or any other container.

ated: April 17, 1970.

WONG, BERGGREN & SIEDMAN
EDWARD H. STEINMAN

By /s/ Edward H. Steinman
Attorneys for Plaintiffs

[Affidavit of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

STATE OF CALIFORNIA)

CITY AND COUNTY OF SAN FRANCISCO)

ss.

I, ISADORE PIVNICK, being first duly sworn, state that I am presently employed by the San Francisco Unified School District and am serving in the capacity of Assistant Superintendent, Innovative Planning. I have been employed by the School District since August, 1947. The San Francisco Unified School District has been involved in special programs for non-English speaking Chinese since 1965 when Title I Elementary and Secondary Education Act Funds were made available for selected poverty stricken youth in San Francisco. At that time fifty-six (56) schools were identified as being eligible for Title I funds.

When this District's application was submitted to the State of California for funding we were informed that insufficient money was available to provide the type of service involved to that number of children. The number of schools was then reduced to twenty-six (26) and no schools in the Chinatown area were listed among these twenty-six (26) designated for special assistance. The San Francisco Economic Opportunity Council requested that consideration be given toward providing services for the Commodore Stockton School and after several meetings with the State Office of Compensatory Education it was agreed that Commodore Stockton School should be included in the program on the basis of language problems of many of the students at the school.

Last year the State Board of Education stated that schools receiving funds under Title I must provide for saturation services in a comprehensive program.

In order to identify children who should receive services, schools were first listed on the basis of AFDC (Aid for Families with Dependent Children) recipients or the 1960 census poverty index. After schools were identified as being eligible the next consideration was communication skills and other test scores. It was on this basis, the need for assistance in learning English, that it was possible to qualify Commodore Stockton School as one of ten schools to receive comprehensive help. This final ten schools represented a reduction from the twenty-six previously approved by the State.

The San Francisco Unified School District is one of two cities awarded funds under Title VII of the Elementary Secondary Education Act for institution of a Chinese bilingual program and has been granted the sum of \$51,500.00 for such a program which is now operative. In addition to this program the School District has invested its own money in a Chinese Education Center which provides services for a limited number of non-English speaking youngsters. Its services are also comprehensive in nature. The School District further provides for the teaching of English to Chinese youngsters living outside of the Chinatown-North Beach area with a functioning program supervised by Mr. Wellington Chew. The term "comprehensive program or plan" is used as part of the State plan for utilization of Title I money. It operates not on the basis of inclusion of all children within a designated School District, but rather for the inclusion of all children attending a designated and approved school. For qualification of a school State and Federal guidelines require that poverty areas be identified on the basis of the criteria of guidelines which I have previously set forth. It is at this point, when a school has been designated, that a comprehensive program is developed to provide services in academic areas as well as ethnic studies and health services.

/s/ Isadore Pivnick

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

I, WELLINGTON CHEW, being first duly sworn, state that I am presently employed by the San Francisco Unified School District and am serving in the capacity of Supervisor of the Chinese Bilingual Program. I have been employed by the School District for twenty years and have served in my present capacity since the inception of this program, in 1967. Prior to that time I taught and was a counselor at Francisco Jr. High School as well as serving in several other capacities for the School District.

The San Francisco Unified School District presently has in operation a Chinese Bilingual Pilot Program funded by \$51,000 received under Title VII of the Elementary and Secondary Education Act and it is hoped and anticipated that it will receive at least \$151,000 for continuation and enlargement of the program during the ensuing year. The San Francisco Unified School District pays the salary of the teacher conducting this program which is done bilingually.

Additionally, the San Francisco Unified School District has set up a Chinese Education Center with approximately \$100,000 of this District's funds, wherein one social studies class is taught bilingually and the remainder of the program is taught by ESL (English as a Second Language). This Center screens incoming students giving them some basic English before they are placed in the San Francisco schools. Furthermore, programs are being conducted in

numerous other schools throughout the City wherein the ESL method is employed to improve the English comprehension of Chinese students (Exhibit A attached). Also attached (Exhibit B) is an outline of the budget for the Chinese Bilingual Education Program from 1966 to 1970, including proposals for 1970-71.

The Chinese Bilingual Program, presently funded with \$50,000 of Federal money, is a pilot program created with the purpose of evaluating student progress and comprehension through the employment of Bilingual Education for non-English speaking students.

/s/ Wellington Chew

[Declaration of Service Omitted]

EXHIBIT A

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT

135 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102
Telephone: (415) 863-4680

CHINESE BILINGUAL EDUCATION
STUDENTS IN PROGRAM—1970

February 26, 1970

	Number of teachers	Students	Grade Level	F = full time P = part time		Funding **
				F	P	
ELEMENTARY						
(Chinatown-North Beach)						
Chinese Education Center	3	71	8-6	F		CEC
Commodore Stockton	1	25	1	F		Title VII
"	2	30	4-6	F		CBE
"	2	30	8-6	F		SFUSD
Garfield	3	45	K-6	F		CBE
Hancock	2	26	8-6	F		CBE
Jean Parker	1	15	8-6	F		CBE
Redding	1	15	K-6	F		CBE
Sarah B. Cooper	1	15	K-3	F		CBE
Spring Valley	2	30	2-6	F		CBE

	Number of teachers	Students	Grade Level	F=full time P=part time	Funding **
Spring Valley	1	15	4-5	F	Comp.
Washington Irving (Richmond District)	2	30	K-6	F	CBE
Alamo)		35	K-6	P	CBE
Lafayette)	1	35	K-6	P	CBE
Argonne)		35	K-6	P	CBE
Frank McCoppin)	1	35	K-6	P	CBE
JUNIOR HIGH *					
Francisco	9	143	7-9	P, F	CBE=1 SFUSD=8
Marina	8	136	7-9	P, F	CBE=8 SFUSD=5
Presidio	2	43	7-9	P	SFUSD
Roosevelt	1	20	7-9	P	SFUSD
SENIOR HIGH *					
Galileo	2	43	10-12	P	SFUSD
Samuel Gompers	1	20	9-12	F	CBE
"	6	143	9-12	P	SFUSD
George Washington	2	26	9-12	P	SFUSD

* For junior, senior high teaching positions

**Budget: CBE=Chinese Bilingual Education

CEC=Chinese Education Center

EXHIBIT B

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT135 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102

Telephone: (415) 863-4680

CHINESE BILINGUAL EDUCATION BUDGET 1966-1970

	1966-67	1967-68	1968-69	1969-70	1970-71
Chinese Bilingual Education	0	\$88,016	\$280,469	\$280,469	\$ 656,248
ESEA Title VII	0	0	0	51,500	50,000
Chinese Education Center	0	0	0	100,000	385,766
TOTAL	0	\$88,016	\$280,469	\$431,969	\$1,092,009

TEACHERS

ELEMENTARY

Chinese Education Center	0	0	0	8	11
Chinese Bilingual Education	0	15	15	17	21
SFUSD	2	2	2	2	2
Compensatory	0	0	1	1	1
ESEA VII	0	0	0	1	1
	<u>2</u>	<u>17</u>	<u>18</u>	<u>29</u>	<u>36</u>

JUNIOR HIGH

Chinese Bilingual Education	0	4	4	4	8
SFUSD	11	11	11	13	18
	<u>11</u>	<u>15</u>	<u>15</u>	<u>17</u>	<u>21</u>

SENIOR HIGH

Chinese Bilingual Education	0	0	1	1	2
SFUSD	6	6	6	7	7
	<u>6</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

STATE OF CALIFORNIA)

) ss.

CITY AND COUNTY OF SAN FRANCISCO)

I YVON JOHNSON, being first duly sworn, state that I am the Acting Director of Research and Program Evaluation for the San Francisco Unified District and I have been employed by this School District for nineteen years. For four and one-half years I served as Assistant Principal at Francisco Jr. High School which has a large number of Chinese students and by virtue of my one and one-half years of study of Cantonese I often conversed with students and children in Chinese. In my service within the School District I have noted that there is a strong divergence of views among many teachers as to whether Bilingual Education or ESL (English as a Second Language) is the better method for teaching non-English speaking students the English language. Bilingual Education combines both the English language and the student's native language toward the goal of learning to speak and comprehend English while preserving the heritage, language comprehension and cultural background of the pupil's native language. English as a Second Language provides an intensified course in learning English and does not require that the teacher have a comprehension of the child's native language. Generally speaking, ESL is a speedier method of learning English as this language is emphasized and concentrated upon by the learning student.

Furthermore, there is support for the theory that placing a child who does not speak English in an involvement where he is not constantly in contact with his native language will speed and encourage his learning of the English language.

/s/ Yvon Johnson

[Declaration of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

STIPULATION—Filed May 12, 1970

IT IS HEREBY STIPULATED between EDWARD H. STEINMAN, attorney for the plaintiffs, and RAYMOND D. WILLIAMSON, JR., attorney for the defendants, that the following figures are true and accurate, and may be admitted without objection into evidence at this hearing for a preliminary injunction:

1. There are—at present—2,856 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English. San Francisco Unified School District, December of 1969 survey conducted by Chinese Bilingual Education Program.

a. Of these 2,856 Chinese-speaking students who need special help in English, 1,066 receive some help. Defendants' Affidavit of Wellington Chew, p. 3.

b. Of the 1,066 Chinese-speaking students receiving help, 633 receive such help on a part-time basis and 433 on a full-time basis. *Ibid.*

2. In November of 1967, there were 2,455 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English. Dr. Robert E. Jenkins, "Bilingual Education in the San Francisco Unified School District," p. 2 (November 21, 1967). Of these 2,455 Chinese-speaking students needing special help, 473 received such help. Dr. Robert E. Jenkins, "Chinese Bilingual Education: A Preliminary Report," p. 8 (1968).

3. According to the annual reports of the Human Relations Division of the San Francisco Unified School District, the following represents the number of Chinese

students in the San Francisco Unified School District
in the years 1966-1969:

15,642 Chinese students—October, 1966

15,559 Chinese students—October, 1967

16,091 Chinese students—September, 1968

16,574 Chinese students—September, 1969

Dated: May 12, 1970.

WONG, BERGGREN & SIEDMAN
EDWARD H. STEINMAN

By /s/ Edward H. Steinman
Attorneys for Plaintiffs
THOMAS M. O'CONNOR
RAYMOND D. WILLIAMSON, JR.

By /s/ Raymond D. Williamson, Jr.
Attorneys for Defendants

APPROVED AND SO ORDERED this date: May 19,
1970.

/s/ Lloyd H. Burke
United States District Judge

Mailed Copies—5/12/1970

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

ANSWER TO COMPLAINT FOR INJUNCTION AND
DECLARATORY RELIEF—Filed May 26, 1970

Come now the defendants ALAN H. NICHOLS, DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., DR. ROBERT E. JENKINS, MRS. DIANNE FEINSTEIN, JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA, TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES MAILLIARD, ROBERT H. MENDELSON, RONALD PELOSI, PETER TAMARAS and MRS. DOROTHY VON BEROLDINGEN and answering the complaint of plaintiffs on file herein, admit, deny and allege as follows:

I

Answering the allegations of plaintiffs' preliminary statement defendants admit that a recent survey of teachers in the San Francisco Unified School District revealed that approximately 2,850 Chinese speaking students need special instructions in English and of these, approximately 1,050 do receive some formal instruction in the English language; and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

II

Denies each and every, all and singular, generally and specifically, the allegations contained in paragraphs II and VI of said complaint.

III

Answering the allegations of paragraph III of said complaint, defendants admit that the named plaintiffs are students presently enrolled in the San Francisco Unified School District and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

IV

Answering the allegations of paragraph V of said complaint, defendants admit that English is the basic language in all public schools in the City and County of San Francisco and that this school district is required by law to maintain classes in grades 1 through 12 and does so; and further admits that children between the ages of 6 and 16 are required by law to attend school; and further admits that the California state legislature in the exercise of its discretion has enacted certain special programs designed to aid special needs of students and has provided funds for some of those programs; and further admit that a teacher survey indicated that approximately 2,850 Chinese speaking students needed special help in English and of these, approximately 1,050 are receiving formal instruction in English and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

V

Answering the allegations of paragraph VII entitled "First Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph VII as they have heretofore made when answering said paragraphs, and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

VI

Answering the allegations of paragraph VIII of said complaint entitled "Second Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph VIII as they have heretofore made when answering said paragraphs; and further admit that equal educational opportunities are offered to all students in the San Francisco Unified School District and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

VII

Answering the allegations of paragraph IX of said complaint entitled "Third Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph IX as they have heretofore made when answering said paragraphs, and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

VIII

Answering the allegations of paragraph X of said complaint entitled "Fourth Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph X as they have heretofore made when answering said paragraphs, and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

IX

Answering the allegations of paragraph XI of said complaint entitled "Fifth Cause of Action" defendants make the same admissions, denials and allegations as to

the paragraphs incorporated by reference in said paragraph XI as they have heretofore made when answering said paragraphs; defendants further admit that a proper "comprehensive compensatory education plan" has been prepared and subitted to the State of California by defendants and defendants are receiving funding for various programs approved by the State in connection with said plan and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

X

Answering the allegations of paragraph XII of said complaint entitled "Sixth Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph XII as they have heretofore made when answering said paragraphs; defendants further acknowledge that California law requires school attendance of children between the ages of 6 and 16 years; defendants further admit the existence of the State Code sections referred to by plaintiffs while denying plaintiffs' interpretation of said sections and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

XI

Answering the allegations of paragraph XIII of said complaint entitled "Seventh Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph XIII as they have heretofore made when answering said paragraphs and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

XII

Answering the allegations of paragraph XIV of said complaint defendants deny each and every, all and singular, generally and specifically, said allegations.

AS AND FOR A FURTHER, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT defendants submit that bilingual education is not a right of any student under either California or Federal law and is merely one of several acceptable methods designed to benefit students in learning the English language.

AS AND FOR A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT defendants allege that plaintiffs fail to state facts sufficient to state a cause of action either for injunction or for declaratory relief under any federal or state statute and thus this Court has no jurisdiction in this matter.

AS AND FOR A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT defendants allege that plaintiff fail to state a cause of action for class relief in that insufficient facts are shown to establish a class.

AS AND FOR A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT the defendant members of the Board of Supervisors allege that by law they are to accept the budget presented them by the Board of Education and thus are not proper parties to this action.

AS AND FOR A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT the defendant members of the Board of Education and the defendant Superintendent of Schools allege that they are within the proper exercise of their discretion in determining budgetary needs of the San Francisco Unified School District and thus no cause of action is stated for which this Court should grant relief against said defendants.

AS AND FOR A SIXTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COM-

PLAINT defendants allege that plaintiffs fail to state facts sufficient to constitute a right which would warrant the exercise of jurisdiction by a Federal District Court.

WHEREFORE, defendants pray that plaintiffs take nothing by their complaint on file herein, that said defendants have judgment for their costs of suit herein incurred and for such other and further relief as to the Court may seem proper.

Dated: May 25, 1970.

/s/ Thomas M. O'Connor
City Attorney

/s/ Raymond D. Williamson, Jr.
Deputy City Attorney
Attorneys for Defendants

Of Counsel:

/s/ Irving G. Breyer

[Declaration of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS
—FILED MAY 26, 1970

STATE OF CALIFORNIA)

CITY AND COUNTY OF SAN FRANCISCO)

ss.

I, EDWARD D. GOLDMAN, being first duly sworn, state that I am employed by the San Francisco Unified School District and have been for 36 years. I am presently serving in the capacity of Associate Superintendent, Instruction.

The School District is aware of the difficulties encountered by many of the students of Chinese ancestry who have an inadequate background in English. In our efforts to better the situation, the District has appropriated for the school year 1969-70, approximately \$1 million in programs for Chinese and Spanish students in the area of English as a second language and bilingual education. It was only recently that an amendment to the Education Code (Section 71) enabled us to use the bilingual method of teaching.

For the school year 1969-70, the Board of Education appropriated over \$100,000 in order to establish a Chinese Education Center. This Center is admittedly just the beginning of fulfilling the total needs of the Chinese community. It is our eventual hope that a program from kindergarten through adult education will be offered in a center in Chinatown. However, recognizing the urgent needs for this kind of program, the District did appropriate at least an initial sum in order to establish a center.

The District has also appointed a supervisor for the Chinese and a supervisor for the Spanish ESL/Bilingual programs. At the high school level, Samuel Gompers has as its major purpose the teaching of immigrant students. In the adult Division of the Unified School District (which is now under the junior college), English for the foreign born comprises 43 per cent of its total budget.

A substantial increase has been requested in the funding of the Chinese bilingual programs for 1970-71 in our continuing efforts to expand and improve the program. As the budget is not yet finalized we cannot say what actual increase will be forthcoming.

Since bilingual education has been allowed by the change in the provisions of the California Education Code, San Francisco has proceeded diligently toward implementing and improving the programs in this area and will continue to do so. On May 19, 1970, the Board of Education passed a resolution establishing the position of Director, ESL/Bilingual Education effective as of July 1, 1970, in further effort to broaden the scope of these programs.

/s/ Edward D. Goldman

Subscribed and sworn to before me this 26th day of May 1970.

/s/ [Illegible]
Notary Public

[Declaration of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

ANSWERS TO INTERROGATORIES—FILED MAY 26, 1970

Comes now IRVING G. BREYER, Legal Adviser to the San Francisco Board of Education, and, being duly sworn, answers plaintiff's interrogatories as follows based upon information and belief:

1. Total students, K through 12 as of September 17, 1969: 90,790.

a) Total Chinese students: 13,225 (14.6%).

2. See Exhibit A, "Pupil Enrollment in the San Francisco Public Schools," attached.

3. 1967-1968 1,549.

1968-1969 No survey taken.

1969-1970 2,856.

a) 1) District wide survey taken November, 1967 and December, 1969.

2) Survey made of all schools. Need for special English instruction based on teacher opinion.

b) See Exhibits B, "Bilingual Education in the San Francisco Unified School District," and C, "Teacher Opinion Survey of Chinese Students Needing Special Help in English," attached.

5. a) 1,066.

b) See Exhibit D, "Chinese Bilingual Education—Students in Program, 1970," attached.

c) Full time - 6 hours per day.

Part time - 1 hour per day.

d) 59, - 21.

e) English patterns, syntax and lexicon appropriate to level of students' understanding. Basically, English

as a Second Language, using the Audio-lingual approach whereby the student is taught to listen and speak before reading and writing. The goal is to help the student learn enough English to function in a regular class. Within one or two years, depending on the student's progress and grade level, most students move out to a transition or regular class.

f) See Exhibit E, "Chinese Bilingual Education, a Preliminary Report," attached.

6. To provide a program to help new immigrant students acquire sufficient English in order to do regular class work and function in the school and community.

a) 995 Full and Part time.

b) 51 - Some one hour a day. Some 6 hours a day.

c) 51 - 21.

d) See Exhibit D.

7. The 1970-71 Budget is not as yet final and thus this question is unanswerable for the 1970-71 fiscal year. Attached, as Exhibit F, is the 1969-70 budget.

a, b) See affidavits filed by defendants in this matter. These funds come from varying sources, including Federal and State funding and funds from this District's own budget.

c, d) See affidavit of Isadore Pivnick previously filed in this matter.

e) Affidavit of Isadore Pivnick, Exhibits F and G, "Compensatory Education Plan," attached.

8. a) 1,610.

b) 63, 33.

c) 61.

1) Full time - 6 hours per day. Part time 1 hour a day.

2) English as a Second Language.

3) All classes in which the teacher is bilingual will have some bilingual instruction. The native language is used for explanation, to clarify a point, and give directions. State texts for Americanization or English as a Second Language will be used along with materials prepared by the teacher.

d) See answer to question #7.

1) \$656,248.

e) See Exhibit H attached.

9. a) 104.

b) 19 at a transition level.

c) 72.

d) 8.

1) 6 Bilingual.

e) The Center uses an audio-lingual approach to the learning of English and English vocabulary of related subject matter. Strong emphasis is placed on experience in doing in an effort to relate language to culture, and the youngsters first culture and language to the new ones he is acquiring.

1) Yes.

f) A tentative budget of \$200,000 which will not be firm until it is approved by the Board of Education. This budget would include a director, a screening community teacher, a curriculum writer, a resource teacher, 11 classroom teachers, 1½ clerks, and 2 school aides. This would handle approximately 165 students at any one time. It would also provide for curriculum development, the training and upgrading of classroom teachers, and the screening of all incoming families with elementary age youngsters.

10. All positions in the Bilingual Education Program are presently filled. When new ones are created the School District will actively recruit qualified applicants to fill those positions. This District does not maintain statistics on qualified bilingual applicants nor on numbers not hired.

a) Since the passage of Education Code Section 13187.6 there have been no openings for teachers in the Chinese Bilingual Program, thus no new hirings.

11. a, b, c) Such statistics are not maintained by this School District.

d) July 1968 to April 1969 (10 months) 691 *

e) July 1969 to January 1970 (7 months) 538 *

* Based only on schools in the Chinatown area.

12. See answer to #11.

13. This School District does not keep statistics as to the information sought in this interrogatory.

14. See answer to #13.

15. See Exhibit C, page 2.

16. The long-range goal of the Spanish Bilingual Education Program is to provide the opportunity for students to gain competence in English and Spanish skills from Kindergarten through Grade Twelve. Besides academic progress, Spanish-speaking students of the target population will gain a sense of identity and pride in their cultural heritage. Participants in the program whose dominant language is English will gain proficiency in Spanish and an appreciation of cultural diversity through association with Spanish-speakers.

a) According to a survey of November 21, 1967 based on teacher opinion, there were 1,890 Spanish-speaking students in need of special instruction in English before they could do regular classwork. As teachers identified only the most severely handicapped, it was assumed that a comprehensive testing program would have yielded a much higher figure.

b, c) During the 1970 Spring semester the Spanish Bilingual Education Program is servicing 686 students at seven elementary and five junior high schools. There are 16 elementary teachers and 10 junior high teachers, all of whom are bilingual (English and Spanish), with the exception of three ESL teachers and the teacher for the Filipino program, who is bilingual in Filipino and English. (also see Exhibit I attached regarding enrollment.)

d, e) The ESL classes are taught primarily with the audio-lingual method, using the H-200 materials at the elementary level and the *English For Today* series at the junior high level. The Spanish Bilingual Education Program initiated a Spanish reading program for the child entering school with little or no knowledge of English.

The concepts in science, mathematics and social studies involve a two-level approach. The teacher first

utilizes the student's native language, Spanish, for the initial presentation, discussion and internalization of the specific concepts, which are developed in depth. The second level utilizes sequentially developed, systematically taught English language structure; thus the student is offered the opportunity to express those concepts first internalized in Spanish, now in the second language, English. In this way the student does not fall behind his grade level in the content subject material of science, mathematics, and social science while he is practicing English structures on a limited and less sophisticated level.

The model for languages of instruction indicates roughly the percentage of Spanish and English used during instruction in various curriculum areas. See diagram, Exhibit J, attached.)

17. Yes.

a) Approximately 13,667 students in grades K through G are involved in the "Sullivan Reading Pilot Project." The District does not keep ethnic statistics for this group of children. The program presents a structured approach to the English language. For non-English-speaking students, the Sullivan Reading Program is not the total reading program, but one in which they learn to decode and encode words and learn sound-symbol relationships and combinations.

b) A test is administered to diagnose the specific needs of the student in terms of decoding and encoding the English language. Post-tests are administered on a regular basis to evaluate the student's ability to use the specific decoding and/or encoding skill that had been taught.

/s/ Irving G. Breyer
IRVING G. BREYER

Subscribed and sworn to before me this 26th day of May, 1970.

(Exhibits A, D, F, G, H, I, and J to the answers to Interrogatories have been deleted from this Appendix)

[Declaration of Service Omitted]

EXHIBIT B

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

OFFICE OF SUPERINTENDENT

135 Van Ness Avenue

San Francisco, California 94102

Telephone: (415) 863-4680

BILINGUAL EDUCATION

IN THE

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

Robert E. Jenkins

Superintendent of Schools

November 21, 1967

BILINGUAL EDUCATION IN THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT

The children and youth who come to our schools with no knowledge of English have two basic needs: to learn English so that they can communicate with others and proceed normally with classroom work in our language, and to find the contributions of their own language and culture recognized and respected.

The term "bilingual education" as here used refers to the instructional programs carried on in the schools to meet these two needs. There are a number of such programs and they vary in structure in accordance with the number, age, and background of students and the special skills and aptitudes of teachers.

Numbers of Students Concerned

A survey just completed asked schools to report, by grade, the numbers of students who need help in learning English. The report was made in terms of two categories—those who have little or no facility in English and are in their first year of instruction in the language, and those who are more advanced in English but need further instruction in it to enable them to function effectively in a regular class. The numbers reported are summarized in the accompanying table (page 2). It is evident from these data that the bilingual education program deserves major consideration in San Francisco. The figures confirm, too, that those in need of help in learning English are for the most part native speakers of the two languages, Chinese and Spanish.

Classes in English as a Second Language

Classes in which the governing objective is to help students learn to communicate in English are known as English as a Second Language or ESL classes. Instruction in these classes is carefully planned, in the same way that foreign language instruction given to English speaking students is planned. The audio-lingual approach

is the one followed, with understanding and speaking given first emphasis and reading and writing following in due course.

While emphasizing the learning of English, ESL programs also recognize the importance of the student's native culture and include in the content of instruction relevant material drawn from that culture. They include appropriate use of field trips, resource persons, and current activities and events in the community.

Instruction through the Medium of the Native Language

In ESL classes, English is the medium of instruction and the native language is used, where at all, only for necessary explanations; this is in order that the main objective, mastery of English, be gained as rapidly as possible. The ESL program must always be recognized as the primary one; concurrent with it, however, it is sometimes possible to conduct a supporting program in the medium of the native tongue. Such a program can help prevent educational retardation, and can also reinforce family pride in the native language and culture. The extent to which instruction in the native language can be provided depends upon:

1. The presence of suitable groupings of students in sufficient numbers to make a class of those with the same native language, of the same grade level, and ready to take the same subject;
2. The availability of suitable instructional materials;
3. The availability of bilingual teachers of the grade level or subject in question;
4. The possibility of suitable scheduling arrangements in the school program.

Dr. A. Bruce Gaarder, Chief of the Modern Foreign Language Section of the U. S. Office of Education, suggests experimentation in offering one class period per day for instruction in what he calls the "non-English mother tongue". He points out the need to reinforce the self-image of non-English ethnic groups as speakers of their native language, and at the same time underlines

Numbers of Students Who Need Special Instruction in English

Beginning: Those whose native language is not English and who are in their first year of instruction in the English language.

Others: Those who are beyond the beginning level but who need more work in English to be able to do well in a regular class.

Grade	Chinese		Spanish Speaking		Other Languages	
	Beginning	Others	Beginning	Others	Beginning	Others
Childrens Centers Nursey	44	0	20	0	5	0
Pre-K	81	15	78	12	2	3
K	148	186	184	104	44	63
1	146	191	86	167	54	51
2	67	175	49	86	33	42
3	78	181	46	100	22	65
4	68	185	38	139	25	58
5	70	107	30	84	18	25
6	61	117	38	74	9	29
7	50	53	83	54	22	12
8	54	60	57	45	12	9
9	55	113	78	55	16	24
10	21	123	8	50	0	34
11	4	105	6	58	3	35
12	9	38	30	31	8	7
Total	906	1549	831	1059	273	457

the importance of learning through the language rather than concentrating on the language itself.

California State Law on Bilingual Education

The bilingual education program has been strengthened by a recent modification in state law. Formerly there was a provision in the Education Code that "All schools shall be taught in the English language". A 1967 amendment changes part of Section 71 of the Code to read:

English shall be the basic language of instruction in all schools.

The governing board of any school district and any private school may determine when and under what circumstances instruction may be given bilingually.

It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that bilingual instruction may be offered in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is authorized to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

The Superintendent of Public Instruction has commented on this amendment in part thus:

I consider this amendment to be the most important piece of legislation affecting our non-English speaking pupils for it permits instruction of subject matter in the language of the non-English speaking child while he receives systematic, sequential and regular English instruction simultaneously. This permissive legislation passed during the 1967 regular session will go into effect the 61st day after the State Legislature adjourns.

The intent of the law is to permit the non-English speaking child to progress in his studies in his native language while learning the English language until he reaches that stage of language development

where he can compete successfully with his peers in the dominant language. The law does not intend to substitute one language for the other as a medium of instruction. Its purpose is to make it possible for schools to adjust their programs to provide effective bilingual instructional programs where needed.

Proposals for Action

Early in September, at the Superintendent's direction, a committee representing all instructional levels was formed to review the programs being carried on by the School District for non-English speaking students. Brief descriptions of some of these programs are appended to this report. At the present stage of its discussions the committee recommends that work proceed along these lines:

1. Expand the offering of classes in English as a Second Language to the extent required by numbers of students who need this help. The classes should be as homogeneous in English proficiency as possible.
2. Continue to develop materials for use by the teachers of ESL classes, and to evaluate such instructional materials and equipment as are available commercially.
3. Provide inservice courses for teachers of ESL classes.
4. Where considered feasible and desirable, encourage instruction through the medium of the native language in classes distinct from ESL classes. Such instruction should occupy for each student probably not more than one period per day; instructional content could well include references to the background and contributions of the native culture. In the junior and senior high schools, these classes should be open as electives to all students, not ESL students alone.
5. Develop additional units on the contributions and culture of the groups represented in our schools

for inclusion at appropriate points in the regular social studies curriculum as taught in English.

6. Continue the development of tests to assist in placement of students in ESL classes.
7. Search for new and innovative procedures in the teaching of English as a second language.
8. Look for outside sources of funding to assist in expanding and strengthening School District program.
9. Compare and evaluate the programs and approaches in the bilingual program, to determine their relative productiveness as a guide for future development.

The committee notes that Spanish as a language is offered at all grade levels from 6 through 12, and suggests that Spanish classes can be a useful vehicle in reinforcing pride of Spanish-speaking students in their native background and culture. Classes in Mandarin Chinese, providing like benefits, are offered in two elementary schools, two junior high schools, and four senior high schools. Study might well be given to the possibility of expanding the offering of the Chinese language.

School Programs in Bilingual Education

These brief descriptions of school programs are included to illustrate the excellent work that is being done in the bilingual program in the San Francisco schools. In these programs teachers make use of a wide variety of instructional materials, some developed here and some published commercially. Teachers demonstrate great ingenuity in producing worksheets and other instructional items to fit the needs of their particular classes; curricular materials are developed also by the School District. Some District publications are *A Guide to Bilingual Education in the Elementary Grades*, *Reading Lessons in English as a Second Language*, and, at the adult level, *English (Americanization—Literacy)*. Tapes as well as printed materials are used. New Materials are sought out and tried as they become available.

Information to be taken home is often prepared in both English and the native language. Counseling, both group and individual, is an important part of all the programs.

Commodore Stockton School

Two types of programs are in operation. In one, for beginners, ESL students remain with the same teacher for most of the day and go to regular classes only for mathematics and physical education. There are two such classes of 15 to 17 pupils each, in grades 4 through 6. In the other program, the pupils are in regular classes most of the day but meet in small groups of 6 to 8 for about 50 minutes daily for special work in English.

Junipero Serra School

Two first-grade ESL classes meet with the same teachers throughout the day. They take all regular first-grade subjects with emphasis on the learning of English, and in addition have 50 minutes of concentrated ESL work daily.

Patrick Henry School

Two special groups of Spanish-speaking children in grades H5, L6, and H6 are formed. One, made up of those who do not speak English, works with a compensatory teacher 50 minutes daily on learning English. The other, composed of bilingual pupils, studies Latin-American culture in classes conducted in Spanish. Once a week the two groups meet together to hear a resource speaker discuss some topic of interest in Spanish, or to hear reports by pupils on their own bicultural studies.

Other Elementary Schools

Elementary schools wherever there are pupils who need help in English provide ESL classes which meet about 50 minutes daily, with the pupils attending regular classes the rest of the time. Teachers for the ESL classes are provided in the compensatory program.

Francisco Junior High School

Here eight sections of Chinese-speaking students are grouped within the seventh, eighth, and ninth grades respectively as beginning, intermediate, or advanced in English. The students in these sections remain together for all subjects except physical education; course content and teaching methods in the various subjects are designed specifically for them. English is the only medium of instruction, but a great deal of attention is given to maintaining interest in and appreciation of the Chinese cultural heritage. The teachers are almost all bilingual in Chinese and English.

Horace Mann Junior High School

A project in bilingual education is in operation, with 57 Spanish-speaking students assigned to it. The students are divided into three groups according to competence in English. Each group has three classes daily in the program with teachers who are bilingual. Two of these classes are classified as English as a Second Language and the third as Bilingual Studies. Classes in Bilingual Studies are taught in Spanish; the content includes orientation to the new country and new surroundings together with material from the regular curriculum.

This project utilizes experience gained during the summer of 1967, when a bilingual program was instituted in the summer school held at Horace Mann. At the same time a workshop for teachers in the bilingual program was conducted; classes for Spanish-speaking students at Horace Mann and for Chinese students at Benjamin Franklin provided demonstration and practice teaching opportunities for the teachers in the workshop.

Marina Junior High School

There are 6 ESL sections; students in them take English and Social Studies together plus sometimes a third subject, and the rest of the day are in regular classes. Vocal music has been found to be a particularly helpful outside elective, as has mathematics also.

Other Junior High Schools

James Lick and Luther Burbank Junior High Schools also have special classes in which a teacher works with a group of students who have not sufficient command of English to succeed in regular classes. These classes remain together through most of the day, taking the subjects in the regular curriculum but with emphasis on the learning of English.

Samuel Gompers High School

Most students of senior high school level who speak another language and need instruction in English go to Samuel Gompers High School for this instruction, although beginning this fall there are two pilot classes in other schools. The pilot classes are at Mission High School, for Spanish-speaking students, and George Washington High School for those who speak Chinese.

ESL students at Samuel Gompers are classified as beginning, intermediate or advanced. Students spend the full school day in classes where the learning of English is the main objective but the content of regular school subjects is included. Instruction proceeds through the accepted audio lingual sequence, beginning with listening and speaking and continuing to reading and composition. A language laboratory provides supplemental instructional help. Students are usually ready for successful participation in a regular high school program after a year of ESL instruction.

Adult Schools

More than eighty classes in English for the Foreign Born are offered as part of the regular Adult School program. Situated in approximately twenty different locations, these classes serve the ever increasing non-English speaking immigrants. In addition to the eighty classes, more than sixty other ESL classes are conducted at numerous locations in the Mission and Chinatown areas under the District's ESEA project. The audio-lingual approach, with emphasis on developing competence in oral communication, is used in all the classes.

City College of San Francisco

City College offers a number of courses in English for the foreign-born, all of which qualify for parallel credit at the University of California. One course provides work in grammar, word study, writing, idiom, and sentence structure; another gives practice in oral expression and in reading; a more advanced course emphasizes the development of the reading and writing skills necessary to college work. There are also courses in English composition for foreign students and in American speech, the latter being designed to develop correct accent, intonation and pronunciation.

Goals of Bilingual Programs

The goals sought in the bilingual programs in the San Francisco schools have been well summarized in a statement developed at Commodore Stockton School, which lists these goals thus: (1) To help the students develop a core of high-frequency vocabulary both on the recognition and spoken levels, to develop a habitual use of a correct pronunciation and English speech patterns, and to develop elementary reading and writing skills; (2) To provide a comfortable environment where these students can make good social and psychological adjustments; (3) To give the students the opportunity to share and take pride in their rich cultural background of history, folktales, and customs; (4) To help the students become familiar with our way of life in America; and (5) to help the students reach a level of English proficiency that will permit them to function effectively in a regular classroom.

Teacher Total-

School

SFU D

PART A: Indicate the number of students who, in your opinion, need special instruction in English, classifying them by grade and native language. Indicate also whether students are in:

- (1) their first year of instruction in English or
- (2) beyond their first year, but still need help to be able to do regular class work.

CHINESE			SPANISH		PILIPINO		OTHER (Please indicate specific language background)			
Grade	1st yr.	Beyond 1st yr.	1st yr.	Beyond 1st yr.	1st yr.	Beyond 1st yr.	1st yr.	Beyond 1st yr.	1st yr.	Beyond 1st yr.
K	250	26								
1	160	81								
2	67	117								
3	76	146								
4	87	123								
5	69	129								
6	95	123								
7	134	187								
8	118	125								
9	132	230								
10	11	141								
11	13	105								
12	3	68								
Total	1255	1601								
							CHINESE			
							ELEM.			
							745			
							TOTAL			
							1539			

**SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT**

**135 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102**

Telephone: (415) 863-4680

CHINESE BILINGUAL EDUCATION

**UNOFFICIAL COUNT: NOT FOR GENERAL RELEASE
IMMIGRANT STUDENTS**

July 1969-January 1970

(7 months)

ELEMENTARY (7 schools in Chinatown)

	<u>New Students</u>	<u>Those Needing Help with English</u>
July, August, September	306	228
October	16	15
November	11	11
December	28	28
January, 1970	<u>34</u>	<u>28</u>
	395	310

SECONDARY (2 Junior High Schools, 2 Senior High Schools)

July, August, September	183	163
October	24	24
November	16	16
December	19	19
January 1970	<u>21</u>	<u>6</u>
	263	228
GRAND TOTAL	<u><u>658</u></u>	<u><u>539</u></u>

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CHINESE BILINGUAL EDUCATION

**UNOFFICIAL COUNT: NOT FOR GENERAL RELEASE
IMMIGRANT STUDENTS** **July 1968-April 1969**

(10 months)

ELEMENTARY (7 schools in Chinatown)

	<u>New Students</u>	<u>Those needing Help with English</u>
July, August, September	123	101
October	14	10
November	19	16
December	34	33
January	83	79
February	56	53
March	41	40
April	51	37
	<u>421</u>	<u>369</u>

SECONDARY (2 Junior High Schools, 2 Senior High Schools)

July, August, September	104	102
October	35	34
November	14	14
December	10	9
January	38	37
February	53	48
March	44	40
April	41	38
	<u>339</u>	<u>322</u>

GRAND TOTAL	<u>760</u>	<u>691</u>
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CHINESE BILINGUAL EDUCATION—Survey of student needs
in English as a Second Language

ELEMENTARY DIVISION

	<u>CHINESE</u>		<u>SPANISH</u>		<u>PILIPPINO</u>	
	<u>1st year</u>	<u>Beyond 1st.</u>	<u>1st year</u>	<u>Beyond 1st.</u>	<u>1st year</u>	<u>Beyond 1st.</u>
ALAMO	9	8			1	
ARGONNE	11	17		3		
CHINESE ED. CENTER	66					
CABRILLO	7	5				1
COMM. STOCKTON	197	183				
COLUMBUS		4		2		
COOPER	22	14	3	1		
FRANK MCCOPPIN	32	17	3	4	11	7
GARFIELD	41	60	9	5		
GEO. PEABODY	27	10	4	1	4	1
HANCOCK	15	30	1	6		1
JEAN PARKER	73	105				
JEFFERSON	7	9		4	2	5
MADISON	9	1	1			
REDDING	26	10	1		1	1
SHERMAN	9	25	4	8	1	5
SPRING VALLEY	57	55				1
SUTRO	9	4				2
SUTRO ANNEX	3					
WASHINGTON IRVING	40	77	—	—	—	—
	660	634	25	34	19	24

**CHINESE BILINGUAL EDUCATION—Survey of student needs
in English as a Second Language**

JUNIOR-SENIOR HIGH DIVISION

	<u>CHINESE</u>		<u>SPANISH</u>		<u>PILIPPINO</u>	
	1st year	Beyond 1st	1st year	Beyond 1st	1st year	Beyond 1st
FRANCISCO	81	189	1			
PRESIDIO	15	23	1			
MARINA	309	236				1
ROOSEVELT	9	13	3	3	1	5
	414	466	5	3	1	6
GALILEO	20	185	1	23		
GEORGE WASHINGTON	0	30				
SAMUEL GOMPERS	15	153	16	47	2	13
	35	368	17	70	2	13

**CHINESE BILINGUAL EDUCATION—SURVEY OF NEEDS
FOR ESL
ELEMENTARY**

(Under 10% Chinese population)

	<u>NEED SPECIAL HELP</u>	<u>RECEIVING SPECIAL HELP</u>
ALVARADO	10	1
ANDREW JACKSON	5	
ANZA	6	3
BESSIE CARMICHAEL	2	
BRYANT	1	4
CLEVELAND	4	
COMMODORE SLOAT	2	2
DANIEL WEBSTER	2	
DIAMOND HEIGHTS	1	1
DOUGLAS	4	
EDISON	7	
E. B. TAYLOR	6	
EL DORADO	4	3

	NEED SPECIAL HELP	RECEIVING SPECIAL HELP
FAIRMOUNT	1	15
FARRAGUT	2	
FRANCIS SCOTT KEY	6	9
FREMONT	5	1
GLEN PARK	3	
GOLDEN GATE	2	
HAWTHORNE	8	5
HILLCREST	4	1
GEARY	4	
JOHN MCLAREN	2	
JUNIPERO SERRA	1	
LAFAYETTE	22	22
LAGUNA HONDA	16	1
LAKESHORE	2	3
LAWTON	7	
LE CONTE	6	
LINCOLN	2	
LONGFELLOW	2	
MARK TWAIN	3	
MARSHALL ANNEX	11	4
MCKINLEY	3	
PARKSIDE	1	
PATRICK HENRY	1	
PAUL REVERE	1	
RAPHAEL WEILL	1	
R. L. STEVENSON	4	
SANCHEZ	15	4
SUNNYSIDE	1	
	<u>190</u>	<u>79</u>

JUNIOR HIGH

	<u>NEED SPECIAL HELP</u>	<u>RECEIVING SPECIAL HELP</u>
A. P. GIANNINI	8	1
APTOS	2	1
EVERETT	5	3
HERBERT HOOVER	13	5
HORACE MANN	1	
JAMES DENMAN	9	
JAMES LICK	1	
LUTHER BURBANK	14	15
PORTOLA	4	
	<u>57</u>	<u>25</u>

SENIOR HIGH

A. LINCOLN	12	4
BALBOA	1	
LOWELL	32	5
MISSION	9	3
POLYTECHNIC	2	
WILSON	2	2
JOHN O'CONNELL	14	8
	<u>72</u>	<u>22</u>

EXHIBIT E**SAN FRANCISCO UNIFIED SCHOOL DISTRICT
CHINESE BILINGUAL EDUCATION****A PRELIMINARY REPORT**

**DR. ROBERT E. JENKINS
SUPERINTENDENT OF SCHOOLS**

1968

PREFACE

Programs for teaching English as a second language have grown in increased prominence in areas with great influx of foreign-born students. The field is relatively new in the public school curriculum. Most of the programs developed have been with students of Spanish heritage. San Francisco, unlike the majority of U.S. cities, has immigrant Chinese-speaking students outnumbering the Spanish-speaking students. Due to the cultural and linguistic differences between the two groups, it has been necessary to create a new program for teaching English to Chinese-speaking students. Upon the recommendation of Superintendent Robert E. Jenkins, the Board of Education passed a resolution for the formation of the Chinese Bilingual Education Program. Mr. Wellington L. Chew was appointed the Supervisor for the innovative program.

Since the inception of the program, requests have been made from educators and interested citizens around the globe for information regarding the new program. It is the intent of this report to make known some of the general features of the Chinese Bilingual Education Program, including an overview of its background, objectives, and progress.

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PART I

BACKGROUND

San Francisco, with its majestic harbor and unique geographical situation, has been the major point of disembarkation for thousands of Chinese immigrants during the past few decades. The immigrant families settle and congregate within a few blocks radius from Grant Avenue, the heart of Chinatown. Customs, traditions, and language of the old country have been kept, practiced, and passed along to the new generations.

Chinatown has become a self-contained little community within the metropolis of San Francisco. Immigrant Chinese need not ever learn the English language to find employment, recreational activities, or social outlets in Chinatown. Most of the business is transacted in both English and Chinese. There are many temples and churches where the priests and ministers are bilingual. The grocery store clerks, the waiters, the physicians, and the bankers all speak Chinese. There are several elementary and secondary schools offering instruction in the Chinese language. Most of the children in the area attend these Chinese language schools in the late afternoons or early evenings after a full day of regular public school.

The immigrant family, in settling with its own people, has limited opportunities for assimilation into the American culture and language. Often, the immigrant student's only contact with the English language is during class time. After class, during lunch and recesses, the immigrant child tends to seek friends among other new arrivals, whose problems and interests are similar to his own. In so doing, there develops a further bond of reinforcing the Chinese language. Few opportunities are afforded or necessary for the student to speak English once he is back home in Chinatown.

In recognizing the need for special classes, the School District has offered English classes to schools where the enrollment of immigrant Chinese has been high. Some of these classes have been called Americanization classes.

Special bilingual teachers have been assigned to teach these classes.

More recently, in the elementary division, teachers of the compensatory classes have taught English to the newly-arrived students. The compensatory class is a pull-out program where about 12 students receive 50 minutes of English instruction daily. For the remainder of the day, the students attend their regular classes.

In February 1967, two pilot classes were established at the Commodore Stockton Elementary School. There are fifteen to seventeen students in each of the classes. The students remain in these classes for all subjects. The lessons in use have been developed by Miss M. Beatrice Sutherland. Two thirty-minute periods of intensive drills are scheduled for the morning and afternoon sessions. Supplementary teaching materials include the Miami Linguistic Series, the Flash-Picture Cards and charts.

Francisco Junior High School, located in the North Beach District, has been the receiving school for many of the elementary schools around the Chinatown area. The enrollment of immigrant students to this school has been particularly high. The school offers eight sections of beginning, intermediate, and advanced English for immigrant students in grades 7, 8 and 9. The students remain in these sections for all subjects except physical education. The subjects are taught in English that is appropriate for the students level of competency in the language.

Marina Junior High School also has been the receiving school for many immigrant students. Six sections have been established to accommodate the new arrivals. The students remain together in the sections for English, social studies, and a third subject such as mathematics or vocal music. The students return to their regular classes for the rest of the day.

A pilot class of 20 senior high school students began at George Washington High School during the summer of 1967 and continued through the regular semester. Students enrolled in this class needed special admission because the high school is considered out-of-the district for Chinatown residents. Materials used for the class included the Sutherland lessons.

Samuel Gompers High School receives the majority of the senior high students who need special help in English. The high school is located in the Mission District, a predominantly Spanish-speaking part of the city, and quite a long distance from Chinatown. The students at the high school are classified as beginning, intermediate, or advanced. They remain in classes where the regular school subjects are taught with emphasis on learning English. A language laboratory provides supplemental instructional help. Students are usually able to return to regular classes on a full-time basis after one year of intensive English study in the special classes.

PART II

SUMMER 1967

A consultant, Miss M. Beatrice Sutherland and two curriculum assistants, Mrs. Nora Haymond and Mrs. Jennie Wong, were appointed to work under the guidance of Dr. Joseph B. Hill, Coordinator, Curriculum. A *Guide to Bilingual Education*, with accompanying tapes was issued, together with a *Reading Pamphlet for Trial Use*. During this time, Miss Sutherland began writing lessons expressly for the School District.

PART III

FALL 1967

A project head, Mr. Elmer Gallegos, and two curriculum assistants, Mr. Philip A. Lum and Mrs. Susan Chang, were appointed to work in the Curriculum Department. The new members assisted in collecting data through interviews and questionnaires concerning the needs of the School District. A bilingual committee, which included educators from all levels of instruction, was formed. An in-service course on teaching English as a second language was implemented. Enrollment in the course was about 150 administrators and teachers. Instructors for the course included Mr. Eddie Hanson, Dr. Kenneth Croft,

Miss M. Beatrice Sutherland, Miss Wendy M. Jayne and Dr. Theodore Parsons.

Under the direction of Dr. Hill, the results of a survey on students needing special English instructions and the recommendations of the bilingual committee were published and presented to the Board of Education.

Due to the interest of civic leaders of the Chinese community and to the support of Superintendent Robert E. Jenkins, the San Francisco Board of Education passed a proposal to expand the Bilingual Education Program. Mr. Elmer Gallegos was appointed Supervisor of the Spanish Bilingual Education Program and Mr. Wellington Chew was appointed Supervisor of the Chinese Bilingual Program. In January 1968, the Board of Education passed the budget for the two programs.

PART IV

SPRING 1968

Recruitment of Teachers

Fourteen teachers (above the usual school-staffing formula) were assigned to eight elementary schools. Four (above formula) teachers were assigned to two junior high schools. The break-down was as follows:

<u>ELEMENTARY SCHOOLS</u>	<u>NUMBER OF TEACHERS</u>
Commodore Stockton	2
Garfield	3
Washington Irving	2
Jean Parker	2
John Hancock	1
Sarah B. Cooper	1
Spring Valley	2
Redding	1
<u>JUNIOR HIGH SCHOOLS</u>	<u>NUMBER OF TEACHERS</u>
Francisco	3
Marina	1

Teacher Training

Four days of orientation classes were held for the newly appointed teachers. Mr. Eddie Hanson, Consultant, California State Department of Education, Miss Wendy Jayne, Consultant, S.F.U.S.D., Miss Pauline Mahon, Principal, Garfield School, Mr. Philip Lum, Curriculum Assistant, were among the speakers. Questions and discussions followed each session.

Special meetings were held for ESL teachers in the program. Sharing and discussions helped clarify many of the unique problems encountered in the ESL classes. Guest speakers and consultants were also invited to talk on their experiences in the field.

The elementary ESL teachers were excused from their classes for two full days of observation in other ESL classes.

A new in-service course specifically designed for teaching English to Chinese-speaking students was offered. The enrollment was about seventy teachers, including a few from the East Bay. The instructors for the methodology meetings included Mr. Eddie Hanson, Mr. Allen Tucker, Director, Chinatown-North Beach English Language Center, Dr. Daniel Glicksberg, Professor of English, San Francisco State College. To talk on the cultural and sociological backgrounds of the students, the speakers were Miss Lorna Logan, Social Worker, Mr. Alan Wong, YMCA Worker, Miss Rosemary Chan, Community Teacher, and Mrs. Diana Ming Chan, Social Worker.

Teaching Materials

Most of the schools used the Sutherland Lessons as the core of their basic English instruction. Supplementary materials included the *Miami Linguistic Series*, the *BRL* and the *McGraw-Hill Sullivan Reading Program*, and selected readers. Garfield School used the *Project H200* lessons, developed at the University of California at Los Angeles.

Teaching aids embraced a variety of items such as the flannel board, the portable clock, the pocket chart, the

hand puppets, etc. Some of the aids which were most useful in drills included the *Flash-Picture Cards*, from Follette's Bookstore, Ann Arbor, Michigan, the items and action charts, and the calendar.

Miss Sutherland, working in Indonesia, continued sending her revised copies of the English lessons, which were finalized in booklet forms for distribution by the Curriculum Department. *General Notes to Spoken English: A Teacher's Guide*, by Miss Sutherland, and *Notes for Teachers of Chinese-Speaking Students*, by Miss Wendy Jayne, were published by the School District and distributed to the teachers. The revision of the reading lessons by the curriculum staff was also completed and is now being prepared for publication.

Consultant Services

Miss Wendy M. Jayne, who worked closely with Miss Sutherland, was appointed Consultant in English-as-a-second language. Miss Jayne made regular visits to the ESL classes. She met with the teachers for consultations and demonstrations. She also assisted in demonstration of teaching techniques in the in-service course.

Miss Jayne began writing the *Student's Handbook* to complete the Sutherland Lessons. The *Student Handbook* is designed as a reference for the individual students to use as he makes progress in the Sutherland English Lessons.

Mini-Conversation Cards by Miss Sutherland were distributed to the students. Each student received a set of the cards to practice common English expressions and idioms. The Mini-Conversation Cards keep pace with the Sutherland Lessons.

Student Selection and Class Placement

Identification of students needing special help in English was made through recommendations of the regular teachers and administrators. The potential ESL student usually was interviewed by the ESL teacher. Level of assignment was made according to the student's facility in English and his chronological age.

The average size for an ESL class in the elementary school was fifteen students. The division was made be-

tween primary grades and intermediate grades. Class size in the secondary school was slightly larger. The division of sections was made within each grade into beginning, intermediate, and advanced ESL classes. Where the enrollment of ESL students was lower, grouping was made on an ungraded basis according to ability.

Enrollment Figures for Spring 1968

Elementary Schools

	Chinese-Speaking Students	Other-Language Students	Total
Commodore Stockton	38		38
Garfield	37	2	39
Hancock	15		15
Cooper	17		17
Jean Parker	28	2	30
Spring Valley	27		27
Redding	11	1	12
Washington Irving	30		30
			<u>208</u>

Junior High Schools

Francisco	152
Marina	118
	<u>270</u>

ESL Classes Formed in Spring 1968 in the Elementary Schools

Commodore Stockton	one intermediate ungraded class one half-day intermediate class one half-day 3rd grade class
Garfield	one 1st-2nd grade class one 2nd-4th grade class one intermediate ungraded class
Hancock	one intermediate ungraded class
Cooper	one primary ungraded class
Jean Parker	one primary ungraded class one intermediate ungraded class
Spring Valley	one intermediate class one 2nd-3rd grade class
Redding	one intermediate class
Washington Irving	one intermediate class one 1st-4th grade class

PART V
SUMMER 1968

Summer In-service Workshop, 1968

In conjunction with the ESL summer school programs, a two-week workshop was offered to interested teachers from the elementary and secondary divisions. The purpose of the workshop was to present modern approaches to language teaching and to offer opportunities for actual practice teaching by the participants. Thirty five teachers attended the workshop.

Through the recommendation of Dr. Daniel Glicksberg and Mrs. Dorothy Danielson, English Department, San Francisco State College, Mr. Edward Devlin was selected to program the workshop. The majority of the instructors for the course were from the American Language Institute, State College. The instructors were as follows:

Dorothy Danielson, Associate Professor of English,
S.F. State College

John Dennis, Associate Professor of English, S.F. State
College

Edward Devlin, Instructor, Monterey Peninsula College

James Kohn, Special Assistant, American Language
Institute

Vern C. Neal, Assistant Director, American Language
Institute

William C. Sinclair, Senior Linguist, Liberian Lang.
Prog., S.F. State College

Darold Smith, Senior Linguist, Liberian Lang. Prog.,
S.F. State College

Allen Sharp, Assistant Director, American Language
Institute

Kay Walker, Instructor, American Language Institute

Velma Winkler, Instructor, American Language Insti-
tute

Mr. Alan Wong, Mrs. Diana Ming Chan, and Mr. James Yang, informed leaders in the community, spoke on the heritage of Chinese students.

Content of the workshop included shock language lessons; MLS film; principles, methods and techniques of audiolingual instruction; comparative analysis of Chinese and English; classroom observations and practice teaching. Teachers were grouped into small sections for discussions on topics of particular interest to their specific grade levels. A tour of Chinatown, arranged by Mrs. Jan Sites, YWCA, Clay Street, and a tour of the Chinatown-North Beach English Language Center afforded further opportunities for the teachers to be acquainted with the community environment and services. The culmination of the workshop was a luncheon at Joe Jung's Restaurant. Teachers were able to meet informally with the instructors and to sample Chinese cuisine. Mrs. James Yang, Youth Director of the Chinese Baptist Church, gave a short resume of the educational programs in Hong Kong.

Rating sheets were given to the workshop participants on the last day of class to evaluate the effectiveness of the workshop. Results tabulated indicate that the teachers felt that the workshop was a success and "superior" in contributing to their knowledge of teaching English to Chinese-speaking students. The teachers were especially enthusiastic about their experience in practice teaching in the ESL classes. The general consensus among the teachers was for inclusion of more practice teaching in future workshops.

Tests and Guidelines

It is the intention of the Chinese Bilingual Program to make available tests and guidelines appropriate and effective for classroom instructions. *A Handbook of Tests and Guidelines for Chinese-Speaking Students* was compiled by the joint efforts of two curriculum assistants in consultation with Mr. Wellington Chew. The pamphlet was submitted to teachers and administrators for their review and evaluation. Suggestions and additions will be incorporated in the final revision.

Summer Schools

Under the direction of Mr. Wellington Chew, Supervisor, the Chinese Bilingual Education conducted summer schools for immigrant students in both the elementary and secondary divisions. The schools involved were Garfield, Jean Parker, Francisco and Galileo. The objective of the summer program was to help students continue to progress in their study of English. Through the intensive audiolingual method, a wide range of planned field trips, enriching activities, and informative talks with community resource persons, the students made impressive gains in the acquisition of the new language and culture of America.

APPENDIX A

BASIC OBJECTIVES

The basic objectives of English As a Second Language (ESL) Classes are derived from current linguistic science and successful teaching practices. The approaches to instruction and the administrative regimens presented in this course of study are directed toward the achievement of these objectives, which may be expressed as follows:

- To facilitate the rapid and effective adjustment of the student to his environment.
- To develop the communication skills (listening, speaking, reading and writing) in English as quickly as is feasible.
- To extend the pride in the student's native culture while developing an appreciation and understanding of the American way of life.

SOCIAL OBJECTIVES

To make every student feel that he belongs to the group.

To take into consideration the individual problems of each pupil—his emotional, and social needs—as well as his educational development.

To be aware of the social, economic, and cultural backgrounds of the students.

To provide satisfaction for students to participate in a group.

To promote social graces, greetings, courteous manners.

To develop primary health habits, cleanliness.

To develop respect for authority, parents, teachers, police, etc.

To promote growth in self-confidence.

To improve the student's self-image.

ACADEMIC OBJECTIVES

To develop listening-speaking skills through real and purposeful situations as indicated by the student's immediate needs, interests, and past experiences.

To provide a regular, continuous, systematic, sequential program.

To develop proficiency in English.

To help every student make effective use of the English language in listening, speaking, reading, and writing.

To encourage thinking in English.

To promote an interest in books, and literature.

To promote confidence in self-expression.

To increase vocabulary.

To increase fluency in reading.

To teach good reading habits.

To develop visual and auditory discrimination.

To help every student to achieve language mastery.

CULTURAL OBJECTIVES

To promote feelings of responsibility in school conduct and social relationships.

To develop respect for the rights of others and the property of others.

To provide opportunities for knowledge of the community.

To help the student accept the privileges and duties of being a citizen in a democratic community.

To facilitate the rapid and effective adjustment and participation of the student in the American culture.

To encourage the student's interests, and ambitions; to further student initiative.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

[Title Omitted]

PLAINTIFFS' AFFIDAVIT OF EDWARD H. STEINMAN—
Filed May 26, 1970

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

I, EDWARD H. STEINMAN, being duly sworn, hereby depose and say:

1. I am an attorney licensed to practice in the State of California, and the attorney of record in the instant matter.

2. On May 15, 1970, I was personally handed the attached Exhibit A from Dr. Richard C. Robbins, Director of the Special Educational Services Department of the defendant SAN FRANCISCO UNIFIED SCHOOL DISTRICT. Dr. Robbins declared that this Exhibit A reflects the number of students in the SAN FRANCISCO UNIFIED SCHOOL DISTRICT who were receiving special help from the Special Educational Services Department during the 1968-69 school year.

3. As the attached Exhibit shows, approximately 2,025 students classified as mentally handicapped received special help and instruction from defendant SCHOOL DISTRICT. Furthermore, Exhibit A shows that 869 students classified as educationally handicapped and an additional 6,000 students with various physical handicaps received special instruction and help. All these students were enrolled in special classes administered by the defendant SCHOOL DISTRICT during the school year 1968-69.

4. Dr. Robbins stated that no figures are currently available concerning the number of students served by the Special Educational Services Department for the school

year 1969-70. Yet, he informed me that the situation for the present school year is quite similar and that an equal number of students with mental, educational, and physical handicaps—which numbered over 9,000 last year—were currently receiving special instruction and help in special classes administered by the defendant SCHOOL DISTRICT. He further stated that, though the statistics are not kept on the number of students needing special help, the Special Educational Services Department is providing special help to most of the students within the School District with mental, educational, and physical handicaps.

/s/ Edward H. Steinman

[Affidavit of Service Omitted]

EXHIBIT A

SPECIAL EDUCATIONAL SERVICES (10,000 +)

	920	1000	800	1500	4500	
Supervisor-Ment. Hand-Elem						
Sup. Ment. Hand Secondary						
Miss Caine		Dr. Boyce	Dr. Dugger	Mr. Cunningham	Mr. Becker	Dr. Robbins
765	71 classes-2nd	800+	794			
51 Classes-El	40 JrHi 31 SrHi	46 Units-Elem	65 Home Tehra.		Hear. Class	131
156	560	11 Units-2nd	9 Hosp. Tehra.		Vis. Class	83
2 Classes TMR	16 JrHiSch. (All)	9 Resident	Ortho School		4388	
Lombard Sch	398	(+7 69-70)	(Prin-Scanlon)		42 Sp. Therap.	
(Prin.-Smyth)	7 SrHiSch (of 8)	7 Read Centers	7 Service Cent ^F		(+2 69-70)	
(+1 69-70)	77		(+1 69-70)		Deaf. School	
	Develop. Center		Spec. Ed. Transp.			
	(Prime-Carusso)					

PROJECTS

In Service EH

Disturbed-Retarded

Deaf-Blind
Creative Movement
Blind

T.E.C.

9

EXHIBIT #5

LAU v. NICHOLS

**United States District Court
(N.D. Calif.)**

**Formal Project Application
BILINGUAL EDUCATION PROGRAM**

**Under the Provisions of Title VII
of PL 89-10, as amended**

TITLE:

**PILOT PROGRAM
CHINESE BILINGUAL**

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

**FORMAL PROJECT APPLICATION
BILINGUAL EDUCATION PROGRAM**

**Under the Provisions of Title VII
of PL 89-10, as amended**

TITLE:

CHINESE BILINGUAL PILOT PROGRAM

Submitted by:

**San Francisco Unified School District
135 Van Ness Avenue
San Francisco, California 94102**

Submitted to:

**Division of Plans and Supplementary Centers
U. S. Office of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202**

Date Transmitted: May 5, 1969

**Prepared by
Supplementary Educational Center
ESEA Title III**

(Pages 1-36 of this Exhibit have been deleted
from this Appendix)

APPENDIX

I. Description of Community to be Served _____	2A
II. Survey by San Francisco Unified School District (November 1968) of Enrollments New to School District (Chinatown-North Beach Area) _____	7A
III. S.F.U.S.D.'s Study for Better Racial Balance in Schools _____	8A
IV. S.F.U.S.D.'s Survey of "Language Spoken at Home" by Students in Chinatown Area _____	9A
V. Numbers of Students Who Need Special Instruction in Cantonese and English _____	10A
VI. Detailed Description of Present Program _____	12A
VII. Aspects of Studied Projects with Relevance to Proposal _____	19A
Institutions for Bilingual Curriculum _____	30A
VIII. Ad Hoc Committee on Chinese Bilingual Education —	31A

I. THE COMMUNITY TO BE SERVED

A. *The Problem of Illiteracy in the Community:*

Located in the northeastern section of San Francisco, in an area approximately thirty-six square blocks, is picturesque Chinatown, the largest Chinese community outside of the orient. The exotic atmosphere provided by its shops, restaurants, temples, and art galleries makes it a major tourist attraction. But beneath the gay colors and bright lights is one of the major poverty areas of San Francisco. In this ghetto one finds substandard housing, overcrowded living quarters, the highest TB and suicide rates in the city, severe unemployment and underemployment. Of the 40,000 residents, 40.6% are designated as poor by the Office of Economic Opportunity. Some 12.2% of the poverty rated families have an annual income of less than \$2,000.

The low earning capacity of the residents can be attributed to their lack of English. The 1960 census shows the area to have the lowest median of school years completed. Statistics from the Adult Opportunity Center in Chinatown give a fair indication of the language needs of the residents. As of September, 1967, there were 2,872 active work applicants. Of these, 18.6% could speak no English; 40.1% had very limited English facility; 21.3% had some facility in English, but spoke with a marked accent. Only 20% of all the applicants had no serious problem with English.

The reason for the low education level is that the area has the highest percentage of foreign born in the city. Immigration figures for 1956 to 1960 show that 22,421 immigrants arrived in the United States from China and that approximately one-third settled in the Chinatown-North Beach Area.

On October 3, 1965 Congress enacted Public Law 89-236 changing the national Origins Quota System, which had determined the number of immigrants admitted to the United States from various countries over the last 40 years. The quota from China was 105 per year. The new law, which went into effect July 1, 1968, liberalized

immigration from the Far East. The San Francisco Economic Opportunity Council, Program Unit Office, estimates that in 1968-69 23,231 immigrants from China will be admitted and of these, 4,788 will settle in San Francisco. The increasing influx of immigrants will further aggravate the problem of illiteracy and poverty.

Many adults with experience in the professions or skilled trades are working in menial jobs as busboys, dishwashers, and kitchen helpers. Others come with a double handicap of being illiterate in both their native language and English.

The problem of the lack of English afflicts not only the adults but the children. A survey was conducted by the public schools in the Fall of 1967 to estimate the number of children who had deficiencies in English. For children from kindergarten through the 12th grade, there were 906 who were in their first year of English and another 1,549 who were beyond the beginning level but still needed help to function in regular classes. When these youngsters are placed in grade levels according to their age and are expected to compete with their English speaking peers, they are frustrated by their inability to understand the regular class work. The problem is particularly severe for those in the high school age group who do not have time to learn sufficient English before they reach the high school age limit. Few are motivated to continue through adult school and they become drop-outs.

In a real sense, Chinatown has become a slum as well as a ghetto. As part of the overall urban problem in America, it seems unlikely that the illiterate and poor can escape. The slums have become ingrown, their denizens increasingly isolated through the lack of education, skills and opportunities. The poor in Chinatown are part of the nation's poor who are impacted into a central city area from which there is no escape. They are trapped as surely as if there were barbed wire around Chinatown.

B. Existing Efforts to Cope with the Problem.

Both the public schools and some private agencies have tried to deal with the problem of English language learning for children and adults. The number of adults involved in learning English as a second language offered by the Adult Division of the public schools, plus those in MDTA English Training Programs, and those in agency and church programs total about 2,400. The demand exceeds the available sources. The majority of Chinese speaking adults who want to learn English attend Americanization classes offered by the Unified School District. As of December 20, 1967, some 1,623 were enrolled in these classes. Both day and evening classes are held to permit students who are working either day or evening to attend. In addition to the regular adult schools, ten different locations in churches and agencies in Chinatown are used.

Because so many of the adults work long hours, their English learning is limited to only two or three hours a day. The result is that many attend for years without enough progress to enable them to get a job outside of Chinatown. One program, on a very limited scale, the MDTA English Training Classes, partially financed by the Federal government attempts to cope with the problem of the working student who cannot find adequate time to go to school. About 100 foreign born Chinese were selected to attend classes eight hours a day, five days a week for 10 months. Financial allowances ranged from \$51.00 per week for a single person to \$81.00 maximum for those with a family.

Another 319 adults are being taught by churches, private agencies, and neighborhood houses.

The public schools have recognized the problem of the immigrant child for many years. Until the 1950's, because of the limitations on Chinese immigrants, the number of new arrivals was small enough so that students were accommodated in regular classes. After the Communist takeover of the Chinese mainland in 1949, San Francisco schools experienced a flood of immigrant youngsters. These were children whose fathers were citizens by derivation; that is, the grandfather or great-grand-

father was a citizen. In 1962, during President Kennedy's administration, a special refugee legislation allowed some five thousand immigrants to enter San Francisco from the Orient. Faced with the pressure of an increasing number of non-English speaking students in school, the school district established special Americanization classes in the secondary schools; two junior high and one high school in the Chinatown-North Beach Area. These classes were limited to about 20 students each, and students were taught using simplified materials appropriate to their level of understanding. Classes were begun in the secondary level before the elementary simply because there was a greater concentration of foreign born students in secondary schools which tend to have an enrollment of 800 to 2000 or more. Elementary schools usually are limited in enrollment to three or four hundred, so tend to have fewer foreign born students.

Due to recent changes in the immigration laws, an increasing number of students continued to flood the schools, both elementary and secondary. In the Spring of 1968, the school district appropriated funds to establish additional classes in the two junior high and one high school. Fourteen new classes were started in the seven elementary schools in the area. The relief has been temporary for, with the new immigration law, a steady stream of immigrant students has created a waiting list in many classes.

The classes in the elementary division are limited to fifteen students each. Although the program is called Chinese Bilingual Education, the method used is primarily the audio-lingual approach, or English as a Second Language. Teachers who can, do use some Chinese in teaching. The District is in the process of planning and developing a program that is actually bilingual in approach under funds to be received under ESEA Title VII.

The problem of English language learning affects both adults and children in the community. For adults, the lack of English results in unemployment or underemployment, low income and substandard living conditions for the family. For children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another

unemployable in the ghetto. The only hope of removing this cause of poverty lies in adequate education, vastly different in extent of services and in kind from what is available at present. The existing sources, both public schools and meager efforts by private agencies and churches, are woefully inadequate.

II. SURVEY BY SAN FRANCISCO UNIFIED SCHOOL DISTRICT (NOVEMBER 1968) OF ENROLLMENTS NEW TO SCHOOL DISTRICT (CHINATOWN-NORTH BEACH AREA)

A. *Enrollment for September through February 1968-1969 (approximate figures):*

Elementary School	380
Secondary School	255

B. *Projected enrollment for 1969-1970 school year, immigrant students in the Chinatown-North Beach area:*

Elementary School	760
Secondary School	460

III. DIVISIONAL SUMMARY OF RACIAL DISTRIBUTION OF PUPILS ATTENDING SAN FRANCISCO PUBLIC SCHOOLS

	WHITE		Chinese		NONWHITE									
	SS	OW	N	C	J	K	AI	F	ONW	TOTAL				
SENIOR HIGH (Including John O'Connell Day & Samuel Gompers)	2,514	9,393	4,527	3,336	370	18	38	357	374	20,927				
%	12.0	44.9	21.6	15.9	1.8	.1	.2	1.7	1.8	100.0				
JUNIOR HIGH	2,692	8,188	5,802	3,036	366	25	20	380	289	20,798				
%	12.9	39.4	27.9	14.6	1.8	.1	.1	1.8	1.4	100.0				
ELEMENTARY (Exclusive of Specials, Pre-K, & Childrens Centers)	6,896	19,347	14,744	6,231	924	77	125	1,718	866	50,928				
%	13.5	39.0	29.0	12.2	1.8	.2	.2	3.4	1.7	100.0				
TOTAL SENIOR HIGH, JUNIOR HIGH & ELEMENTARY	12,102	36,928	25,073	12,603	1,660	120	183	2,455	1,529	92,653				
%	13.1	39.9	27.1	13.6	1.8	.1	.2	2.6	1.6	100.0				

PRE-KINDERGARTEN

(Including John
Adams Family Life
Pre-School Pupils)

%

ADULT EDUCATION

%

SPECIAL SCHOOLS &
CLASSES

%

CHILDRENS CENTERS
(Nursery)

%

TOTAL ALL SCHOOLS
(Excluding City
College)

%

CITY COLLEGE

%

September 27, 1968

SS	OW	N	C	J	K	AI	F	ONW	TOTAL
100	46	208	82	3	0	9	12	12	472
21.2	9.7	44.1	17.4	.6	.0	1.9	2.5	2.5	99.9
4,912	12,235	3,337	3,265	788	141	100	705	377	25,810
19.0	47.4	12.9	12.7	2.9	.5	.4	2.7	1.5	100.0
154	545	542	76	6	0	3	20	9	1,355
11.4	40.2	40.0	5.6	.4	.0	.2	1.5	.7	100.0
50	216	286	65	3	0	1	5	26	652
7.7	33.1	43.9	9.9	.5	.0	.2	.3	3.9	100.0
17,318	49,970	29,446	16,091	2,410	261	236	3,197	1,953	120,942
14.3	41.3	24.4	13.3	2.0	.2	.3	2.6	1.6	100.0
681	7,525	1,488	3,169	(includes J & K)		45	279	(incl. ONW)	13,187
5.2	57.1	11.3	24.0			.3	2.1		100.0

IV. SURVEY OF LANGUAGE SPOKEN AT HOME

CANTONESE

I. Cantonese Spoken at Home

Elementary	6,231
Junior High	2,873
Senior High	3,336
Total	<u>12,445</u>

II. Cantonese-Speaking Children Enrolled in an ESL or Bilingual Class

Elementary	276
Junior High	267
Senior High	65
Total	<u>608</u>

III. Cantonese Speaking Children in Need, But Not Enrolled in an ESL or Bilingual Class

Elementary	1,061
Junior High	119
Senior High	50
	<u>1,230</u>

V.

**NUMBERS OF STUDENTS WHO NEED INSTRUCTION
IN CANTONESE AND ENGLISH**

GRADES	Number of Children Whose Language at Home is Chinese	Number of Children Enrolled in ESL, Bilingual or Compensatory Class	Number of Children in Need but not En- rolled in an ESL Bilingual or Compensatory Class
K	Distribution by Schools and Not Grade Levels		200
1		20	250
2		30	157
3		53	135
4		44	126
5		59	95
6		70	98
	Elementary Sub-Total - 6,231	276	1,061
7	908	65	39
8	945	102	12
9	1,025	100	68
10	1,064	19	15
11	1,142	21	15
12	1,130	25	20
	Secondary Sub-Total - 6,214	332	169
	DISTRICT TOTAL - 12,445	608	1,230

V.

NUMBER OF CHINESE STUDENTS WHO NEED SPECIAL INSTRUCTION IN ENGLISH

CHINESE	
GRADE	Beginning* Others**
Childrens Centers Nursery	44 0
Pre-K	31 15
K	148 136
1	146 191
2	67 175
3	78 181
4	68 135
5	70 107
6	61 117
7	50 53
8	54 60
9	55 113
10	21 123
11	4 105
12	9 38
TOTAL	906 1,549
GRAND TOTAL	
2,455	

* BEGINNING:

Those whose native language is not English and who are in their first year of instruction in the English language.

** OTHERS:

Those who are beyond the beginning level but who need more work in English to be able to do well in a regular class.

ges 12A-31A have been deleted from this Appendix]

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EXHIBIT No. 6

U.S. DEPARTMENT OF HEALTH, EDUCATION,
AND WELFAREOffice of the Secretary
Washington, D.C. 20201

HEW NEWS

For Release in A.M. Papers, Monday, May 25, 1970

MATHIS—962-5815
(Home)—522-6212

HEW-Z7

LAU V. NICHOLS

U.S. Dist. Court (N. D. Calif.)

HEW Secretary Robert H. Finch today notified more than 1,000 U.S. school districts where language barriers discriminate against Spanish-surnamed students and other national origin minorities that such barriers must be removed.

The HEW policy was defined in a memorandum distributed today to all school districts with more than five percent national origin minority enrollment.

If students cannot understand the language their teachers are using, it's hopeless to expect them to learn," Secretary Finch said. "There are some 2,000,000 Spanish-surnamed students in our public schools and almost 1,000,000 Oriental students. Overcoming the English language deficiency that exists is a first-order of business." Spanish-surnamed students include Mexican-American, Puerto Rican, Cuban and Latin-American national origins. The HEW memorandum, signed by J. Stanley Pottinger, Director of HEW's Office for Civil Rights, underscores responsibilities of the school districts under the law. The Office for Civil Rights administers Title VI of the Civil Rights Act of 1964, which prohibits use of Federal funds for programs that discriminate as to race, color or national origin.

The memorandum is the first time the Department has defined its policies with regard to possible discrimination against national origin minorities.

Specifically, the memorandum states that where inability to speak and understand the English language excludes national origin minority group children from effectively participating in a school district's educational program, the district must take positive steps to correct the language deficiency in order to open the program to these students.

In addition, school districts must not assign these students to classes for the mentally retarded, as has been done on some occasions in the past, on the basis of criteria which essentially measure or evaluate English language skills. Districts also may not deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to teach English language skills.

The memorandum adds that any ability grouping or tracking system used by the school system to deal with the special language skill needs of these children must be designed to meet these needs as soon as possible and must not operate as an educational dead-end or permanent track.

School districts also have the responsibility to insure that national origin-minority group parents are notified of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

"We realize, of course," Mr. Pottinger said, "that many school districts receiving the memorandum are already making extensive efforts on their own initiative to help remove English language deficiencies.

"For example, school officials are increasingly aware of the need to talk to parents in the language they best understand, in counseling and guidance sessions, in sending out written health notices, or in any other area of communication. These are examples of affirmative action that should be encouraged. There are many others."

Mr. Pottinger said that from now on the areas of concern he mentioned would be regarded by personnel in his office as a part of their responsibilities in their routine reviews of school districts to determine compliance with the Civil Rights Act of 1964.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

KINNEY KINMON LAU, a Minor by and through MRS.
KAM WAI LAU, his Guardian ad Litem, ET AL., PLAINTIFFS

vs.

ALAN H. NICHOLS, ET AL., DEFENDANTS

ORDER

A hearing was held in this case on May 12, 1970, upon plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. Pursuant to Rule 65 (a) (2) of the Federal Rules of Civil Procedure, this Court—with the agreement of both plaintiffs and defendants—consolidated the trial of this action on the merits with the hearing on the two motions.

Initially, this Court can dispose of the defendants' motion to dismiss. Since jurisdiction lies in this case, under either Section 1331 or Section 1343 of Title 28 of the United States Code, and since plaintiffs have stated numerous claims upon which relief could be granted, this Court denies defendants' motion to dismiss.

FINDINGS OF FACT

The following facts have been stipulated to by the plaintiffs and defendants, and are thus found by this Court:

1. At present, there are 2,856 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English.
2. Of these 2,856 Chinese-speaking students needing special instruction in English, 1,790 receive no special help or instruction at all.
3. Of the remaining 1,066 Chinese-speaking students who do receive some special help, 633 receive such

help on a part-time basis and 433 on a full-time basis.

This Court also finds as a fact that only 260 of the 1,066 Chinese-speaking students receiving special instruction in English are taught by bilingual, Chinese-speaking students.

This Court further finds the following facts to be true, though not stipulated to by the respective parties:

1. Defendants recognize the importance of an education and equal educational opportunities, and make education available to plaintiffs on the same terms and conditions as it is available to other groups within the School District.
2. This Court recognizes that defendants have made efforts toward remedial education programs for Chinese-speaking students, although whether such efforts are effective or in need of substantial improvement is a conclusion which this Court does not make.

CONCLUSIONS OF LAW

There is complete agreement among all parties—including this Court—that the plaintiffs have rights to an education and to equal educational opportunities, under the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature. The issue confronting this Court is what type of educational program satisfies these rights.

This Court fully recognizes that the Chinese-speaking students involved in this action have special needs, specifically the need to have special instruction in English. To provide such special instruction would be a desirable and commendable approach to take. Yet, this Court cannot say that such an approach is legally required. On the contrary, plaintiffs herein seek relief for a special need—which they allege is necessary if their rights to an education and equal educational opportunities are to be received—that does not constitute a right which would create a duty on defendants' part to act. These Chinese-

speaking students—by receiving the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students.

Although this Court and both parties recognize that a bilingual approach to educating Chinese-speaking students is both a desirable and effective method, though not the only one, plaintiffs have no right to a bilingual education. Again, this Court is in no position to mandate that such instruction must be given by bilingual Chinese-speaking teachers; though desirable, there is no legal basis to require it.

Therefore, for the foregoing reasons, this Court must deny relief to plaintiffs. Accordingly, this Court now orders that plaintiffs' motion for preliminary injunctions, permanent injunctions, and declaratory relief be hereby denied, that defendants' motion to dismiss be denied, and that this Court finds for the defendants on the merits of this case.

IT IS SO ORDERED.

Dated: May 26, 1970.

/s/ Lloyd H. Burke
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 26,155

KINNEY KINMON LAU, a Minor by and through MRS. KAM WAI LAU, his Guardian ad Litem; DAVID LEONG, his Guardian ad Litem; YUE BEW LEONG, his Guardian ad Litem; JOAN YEE, a Minor by and through MRS. FUNG YEE YEE, her Guardian ad Litem; PAULETTE CHEUNG, a Minor by and through KUN CHEUNG, her Guardian ad Litem; JUDY SUN, a Minor by and through MRS. JULIA SUN, her Guardian ad Litem; WAILY TOM, a Minor by and through MRS. CHOI KAM TOM, his Guardian ad Litem; KAREN YEE, a Minor by MRS. FUNG YEE YEE, her Guardian ad Litem; KAREN CHIU, a Minor by and through MRS. MOY HOR CHIU, her Guardian ad Litem, and DAVID SUN; a Minor by and through MRS. JULIA SUN, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated,

KIT LING LEE, a Minor by and through HENRY LEE, her Guardian ad Litem; STANLEY CHEUNG, a Minor by and through KUN CHEUNG, his Guardian ad Litem; SAI CHONG LEE, a Minor, by and through HENRY LEE, his Guardian ad Litem; and SAI HO LEE, a Minor by and through HENRY LEE, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated, PLAINTIFFS-APPELLANTS

vs.

ALAN H. NICHOLS, President, and DR. LAUREL, E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., in their official capacities as members of the Board of Education of the San Francisco Unified School District; DR. ROBERT E. JENKINS, Superintendent of the San Francisco Unified School District; and MRS. DIANNE FEINSTEIN, President, and JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA, TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES

MAILLIARD, ROBERT H. MENDELSON, RONALD PELOSI,
PETER TAMARAS, MRS. DOROTHY VON BEROLDINGEN, in
their official capacities as members of the Board of
Supervisors of the City and County of San Francisco,
DEFENDANTS-APPELLEES

[January 8, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS and TRASK, Circuit Judges, and
HILL,* District Judge

TRASK, Circuit Judge:

This appeal is from the district court's adverse disposition of a civil rights class action filed by appellants to compel the San Francisco Unified School District to provide all-non-English-speaking Chinese students attending District schools with bilingual compensatory education in the English language. The defendants-appellees are the superintendent and members of the Board of Education of the School District, and members of the Board of Supervisors of the City and County of San Francisco.

Two classes of non-English-speaking Chinese pupils are represented in this action. The first class, composed of 1,790 of the 2,856 Chinese-speaking students in the District who admittedly need special instruction in English, receive no such help at all. The second class of 1,066 Chinese-speaking students receive compensatory education, 633 on a part-time (one hour per day) basis, and 433 on a full-time (six hours per day) basis. Little more than one-third of the 59 teachers involved in providing this special instruction are fluent in both English and Chinese, and both bilingual and English-as-a-Second Language (ESL) methods are used. As of September 1969,

* Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

there were approximately 100,000 students attending District schools, of which 16,574 were Chinese.¹

Appellants' complaint states seven causes of action, alleging violations of the United States Constitution, the California Constitution,² Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and provisions of the California Education Code. Essentially, appellants contend that appellees have abridged their rights to an education and to bilingual education, and disregarded their rights to equal educational opportunity among themselves and with English-speaking students. They pray for de-

¹ The parties stipulated:

"1. There are—at present—2,856 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English. . . .

a. Of these 2,856 Chinese-speaking students who need special help in English, 1,066 receive some help

b. Of the 1,066 Chinese-speaking students receiving help, 633 receive such help on a part-time basis and 433 on a full-time basis. . . .

"2. In November of 1967, there were 2,455 Chinese-speaking students in the San Francisco Unified School District who needed special instruction in English Of these 2,455 Chinese-speaking students needing special help, 473 received such help

"3. According to the annual reports of the Human Relations Division of the San Francisco Unified School District, the following represents the number of Chinese students in the San Francisco Unified School District in the years 1966-1969:

15,641 Chinese Students—October, 1966

15,559 Chinese students—October, 1967

16,091 Chinese students—September, 1968

16,574 Chinese students—September, 1969."

These statistics were provided by the parties to the district court in the first half of 1970. We have been given no reason to think that they no longer adequately reflect the relative dimensions of the problem the School District faces in attempting to provide quality education for all its students.

² The right to an education is claimed under the Fifth (Due Process), Ninth (Reserved Powers), and Fourteenth (Equal Protection Clause) Amendments to the Constitution of the United States; and under Article IX, Section 5 of the Constitution of the State of California (Provision for system of common schools).

claratory judgment and for preliminary and permanent injunctive relief mandating bilingual compensatory education in English for all non-English-speaking Chinese students.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), and 1343 (civil rights). This court's jurisdiction arises under 28 U.S.C. § 1291, as the district court's order finding for appellees on the merits was a final order.³

As hereinbefore stated, the district court denied appellants all relief, and found for appellees on the merits. The court expressed well-founded sympathy for the plight of the students represented in this action, but concluded that their rights to an education and to equal educational opportunities had been satisfied, in that they received "the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District" Appellees had no duty to rectify appellants' special deficiencies, as long as they provided these students with access to the same educational system made available to all other students.⁴

In appealing this case, appellants argue⁵ that the district court misconstrued the meaning of the mandate of *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), that education, "where the state has undertaken to provide it, is a right which must be available to all on equal terms." In *Brown*, appellants continue, "equal terms" meant without segregation imposed by law, because even though there was "surface equality," it "caused . . . a sense of inferiority in minority children which

³ Order p. 3. C.T. at 420.

⁴ Appellees challenge the employment of a class action in this case. Although the district court did not explicitly rule on this issue, its denial of appellees' motion to dismiss, and decision on the merits implicitly determined that the class action was proper. We agree, Fed. R. Civ. P. 23.

⁵ The amicus curiae briefs filed by the United States and the Center for Law and Education, Harvard University (Center) in support of appellants, which have been of great assistance to this court in reaching its decision, raise basically the same arguments as appellants.

affected their ability and motivation to learn and tended their educational and mental growth." Brief for Appellants at 21.

As applied to the facts of this case, appellants reason, *Brown* mandates consideration of the student's responses to the teaching provided by his school in determining whether he has been afforded equal educational opportunity. Even though the student is given the same course of instruction as all other school children, he is denied education on "equal terms" with them if he cannot understand the language of instruction and is, therefore, unable to take as great an advantage of his classes as other students. According to appellants, *Brown* requires schools to provide "equal" opportunities to all, and equality is to be measured not only by what the school offers the child, but by the potential which the child brings to the school. If the student is disadvantaged with respect to his classmates, the school has an affirmative duty to provide him special assistance to overcome his disabilities, whatever the origin of those disabilities may be.

Appellants' reading of *Brown* is extreme, and one which we cannot accept. There, the Court held that legally constituted and enforced dual school systems were unconstitutional as a denial of equal protection; that state-maintained "separate but equal" educational facilities, sanctioned by *Plessy v. Ferguson*, 163 U.S. 537 (1886), were no longer to be allowed. *Brown* concerned affirmative state action discriminating against persons because of their race. *Swann v. Board of Education*, 402 U.S. 1, 5 (1971). It struck down the denial of admission of black children to schools attended by white children under laws requiring or permitting segregation according to race. *Brown v. Board of Education*, 347 U.S. at 488. It followed the dictate of the Fourteenth Amendment, that "[n]o State shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. Amend. XIV, § 1 (emphasis supplied). Therefore, under *Brown*, cases of de jure, as contrasted with de facto, discrimination violate the constitutional command.* Other cases have fol-

* Relying upon the third party beneficiary rationale of *Lemon v. School Board*, 240 F. Supp. 709, 713 (W.D. La. 1965), *aff'd* 370

lowed the same rationale, *Gomperts v. Chase*, 329 F. Supp. 1192, 1195 (N.D. Cal. 1971), *application for injunction pending filing of petition for writ of certiorari denied, supra* at 15-18; *Kelly v. Guinn*, 456 F.2d 100, 105 (9th Cir. 1972); *Keyes v. School District No. 1*, 445 F.2d 990, 999 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972); *Davis v. School District*, 443 F.2d 573, 575 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *Deal v. Board of Education*, 419 F.2d 1887, 1888 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971), and 369 F.2d 55, 62 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Johnson v. School District*, 339 F. Supp. 1315 (N.D. Cal. 1971), *application for stay pending appeal denied sub nom. Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971);⁷ *Spencer v. Kugler*, 326 F. Supp. 1235, 1239, 1241-42 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972); *Cisneros v. School District*, 324 F. Supp. 599, 616-20 (S.D. Tex. 1970), *supplemented by* 303 F. Supp. 1377, *application for reinstatement of stay granted*, 404 U.S. 1211 (1971), *aff'd in part, modified in part and remanded*, No. 71-2397 (5th Cir. August 2, 1972); *United States v. Texas*, 321

F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967), appellants also charge that appellees have violated Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

It is noted that Section 601 requires affirmative action by which a person is "excluded" from participation, "denied" the benefits, and "subjected" to discrimination.

Our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act.

⁷ Oral argument of the appeals from the district court's judgment in this case, Nos. 71-1877-78, 71-2105, 71-2163, 71-2189, was heard before a panel of this court on January 14, 1972. Subsequently, Judge Madden, who was a member of the panel died, and Judge Browning was drawn by lot to replace him. By order of March 1, 1972, the panel vacated the submission of the case, to be set for reargument after the Supreme Court's disposition of *Keyes v. School District No. 1*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972).

F. Supp. 1043 (E.D. Tex. 1970), *supplemented by* 330 F. Supp. 235, *aff'd*, 447 F.2d 441 (5th Cir. 1971), *application for stay denied sub nom. Edgar v. United States*, 404 U.S. 1026 (1971), *cert. denied*, 404 U.S. 1016 (1972); *Spangler v. Pasadena Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970).

The parameters of de jure segregation are still being explored by the courts.* If the neighborhood school system is manipulated by the school board in such a way as to create, encourage or foster racial imbalance, courts have determined that a constitutional violation has occurred. *E.g.*, *Gomperts v. Chase*, *supra*. The courts have found de jure segregation where the school district has redrawn boundaries of existing schools so as to increase racial imbalance, by detaching compact, racially homogeneous neighborhoods from attendance zones for schools populated predominantly by members of another race. *See, e.g.*, *Keyes v. School District No. 1*, *supra* at 1000-01; *Davis v. School District*, *supra* at 574; *Johnson v. School District*, *supra* at 1318, 1336-37; *United States v. Texas*, *supra* at 1049-50; *Cisneros v. School District*, *supra* at 617-18; *Spangler v. Board of Education*, *supra* at 507-510.

Another indicium of de jure segregation is the selection of construction sites for and establishment of attendance boundaries of new schools. If this is done in such a way

* Next term, the Supreme Court will hear *Keyes v. School District No. 1*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972), which raises the issue if and when the imposition of a neighborhood school system upon racially segregated residential patterns violates the Constitution. The Court has affirmed without opinion the judgment of the United States District Court for the District of New Jersey holding that drawing of school district boundaries which results in racially identifiable schools because of demographic patterns within the district is not per se unconstitutional. *Spencer v. Kugler*, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972).

* *Cisneros v. School District*, 324 F. Supp. 599, 604-08 (S.D. Tex. 1970), *supplemented by* 330 F. Supp. 1377, *application for reinstatement of stay granted*, 404 U.S. 1211 (1971), *aff'd in part, modified in part and remanded*, No. 71-2397 (5th Cir., August 2, 1972), involves discrimination against Mexican-Americans, a readily identifiable ethnic-minority group the courts found were protected by the Equal Protection Clause.

as to increase the racial imbalance in schools, as by marking zones which coincide with racial residential patterns, courts have detected a constitutional violation. See, e.g., *Kelly v. Guinn*, *supra* at 105-07; *Keyes v. School District No. 1*, *supra* at 1000; *Davis v. School District*, *supra* at 575; *Johnson v. School District*, *supra* at 1318, 1337; *Cisneros v. School District*, *supra* at 617-19; *Spangler v. Board of Education*, *supra* at 517-18.

Similarly, if mobile units and additions are used to accommodate overcrowding in racially identifiable schools when the reassignment of students to schools populated predominantly by scholastics of another race would be feasible, de jure segregation has been perceived. See, e.g., *Keyes v. School District No. 1*, *supra* at 1000; *Johnson v. School District*, *supra* at 1318-19; *Cisneros v. School District*, *supra* at 618-19; *Spangler v. Board of Education*, *supra* at 518-19.

If the school district allows students to use transfers solely to move from minority to majority schools, courts have discerned a violation of the Constitution. See, e.g., *United States v. Texas*, *supra* at 1049; *Cisneros v. School District*, *supra* at 619; *Spangler v. Board of Education*, *supra* at 520-21.

School boards have likewise been charged with practicing de jure segregation if they hire and assign faculty on the basis of race, thereby creating racially identifiable schools. See, e.g., *Kelly v. Guinn*, *supra* at 106-07; *Johnson v. School District*, *supra* at 1318; *Cisneros v. School District*, *supra* at 619-20; *Spangler v. Board of Education*, *supra* at 513, 515.

Intra-class grouping, when it operates to separate students by race and without reference to ability, has been considered constitutionally infirm. See, e.g., *Spangler v. Board of Education*, *supra* at 519-20.¹⁰

And a state agency's failure to consolidate small school districts solely because each is populated by predominantly one and a different race was thought to contravene

¹⁰ Separate instruction of linguistically deficient pupils can violate the Equal Protection Clause. See *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951); *Mendez v. School District*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd on other grounds*, 161 F.2d 774 (9th Cir. 1947).

the constitutional mandate. See *United States v. Texas*, *supra* at 1047-48.

Appellants have neither alleged nor shown any such discriminatory actions by appellees. The evidence, that English is and has been uniformly used as the language of instruction in all district schools, does not evince the requisite discrimination in the maintenance of this otherwise proper policy.¹¹

Neither can appellants invoke the teachings of cases like *Gaston County v. United States*, 395 U.S. 285 (1969); *Griffin v. School Board*, 377 U.S. 218 (1964); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915); *United States v. Logue*, 344 F.2d 290 (5th Cir. 1965); *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962); and *Franklin v. Parker*, 223 F. Supp. 724 (M.D. Ala. 1963), *aff'd as modified in other part*, 331 F.2d 841 (5th Cir. 1964). In those cases, facially neutral policies were held unconstitutional not simply because the burdens they created fell most heavily upon Blacks, but because the states' actions perpetuated the ill effects of past de jure segregation.

Although in its amicus curiae brief the Center for Law and Education, Harvard University, portrays appellants as "members of an identifiable racial minority which has historically been discriminated against by state action in the area of education . . .," Brief at 28,¹² appellants have alleged no such past de jure segregation. More importantly, there is no showing that appellants' lingual deficiencies are at all related to any such past discrimination. This court, therefore, rejects the argument that appellees have an affirmative duty to provide language instruction to compensate for appellants' handicaps, because they are carry-overs from state-imposed segregation. See *Swann v. Board of Education*, 402 U.S. 1, 15 (1971). If there are any such remnants, that appellants' primary

¹¹ "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

¹² See *Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971).

language is Chinese has not been shown to be one of them.

It is with this reasoning in mind that we consider, and distinguish, *United States v. Texas*, No. 5281 (E.D. Tex., Dec. 6, 1971), a case which was brought to our attention by the Center Brief at 35-37, and heavily relied upon by appellants during oral argument. To be sure, in that order the court mandated bilingual education for Mexican-American and Anglo-American students in the San Felipe-Del Rio Consolidated Independent School District. However, the basis for that order was the court's prior determination, 321 F. Supp. 1043 (1970), *supplemented by* 330 F. Supp. 235, *aff'd*, 447 F.2d 441 (5th Cir.), *application for stay denied sub nom. Edgar v. United States*, 404 U.S. 1206 (1971), *cert. denied*, 404 U.S. 1016 (1972), that there had been de jure segregation. The purpose of the order was therefore, to "eliminate discrimination root and branch," *Green v. New Kent County Board of Education*, 391 U.S. 430 (1968), and to create a unitary school system with no [Mexican] schools and no white schools but just schools." *United States v. Texas*, No. 5281 (E.D. Tex., Dec. 6, 1971), unprinted opinion at 7; *accord*, 321 F. Supp. at 1052. As we have discussed, *supra*, such a rationale for requiring compensatory bilingual instruction is not applicable under the facts of this case.

In that case the court relied heavily upon a study by Dr. Cardenas concluding that the inability of the Mexican-American students to benefit from the educational system resulted from characteristics called "cultural incompatibilities" and English language deficiencies. These ethnically-linked traits—"albeit combined with other factors such as poverty, malnutrition and the effects of past educational deprivation" combine to identify this group and have "elicited from many school boards" the different and often discriminatory treatment. The court's comprehensive remedial education plan included mandated programs to develop language skills in a secondary language (English for many Mexican-American students, Spanish for Anglo students) so that "neither English nor Spanish is presented as a more valued language." Mem-

orandum Opinion Regarding the San Felipe-Del Rio Consolidated Independent School District. No. 5281 (E.D. Texas, Dec. 6, 1971).

Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a "denial" by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group. Before the Board may be found to unconstitutionally deny special remedial attention to such deficiencies there must be found a constitutional duty to provide them.

However commendable and socially desirable it might be for the School District to provide special remedial educational programs to disadvantaged students in those areas, or to provide better clothing or food to enable them to more easily adjust themselves to their educational environment, we find no constitutional or statutory basis upon which we can mandate that these things be done.

Appellants also rely on cases which have held it unconstitutional for a State to condition access to the criminal system upon the payment of money. *E.g.*, *Mayer v. Chicago*, 404 U.S. 189 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956). See also *Tate v. Short*, 401 U.S. 395 (1971). Appellants reason that both criminal and education systems are products of State government to which appropriate persons must submit themselves.¹³ And, just as

¹³ All persons between the ages of six and sixteen are compelled to attend public school or receive equivalent education, Cal. Educ. Code § 12101. But see *Wisconsin v. Yoder*, No. 70-10, 40 U.S.L.W. 4476 (U.S. May 15, 1972).

the indigent convict cannot take proper advantage of the legal system available to him if he does not have a lawyer, or a sufficient record of his trial, or enough money to activate the review process or pay his fine, so the Chinese-speaking children in this case lost the benefits of the educational system because they cannot understand the language in which they are taught. Furthermore, the parallel continues, it is argued, in the fact that a convict's poverty is no more ascribable to the State than the language deficiency of these non-English-speaking Chinese students.

These criminal cases are distinguishable, however, because the ability of a convict to pay a fine or a fee imposed by the state, or to pay a lawyer, has no relationship to the purposes for which the criminal judicial system exists. Wealth is irrelevant to the factual determination of guilt, and is extraneous to resolution of related legal disputes. See *Mayer v. Chicago*, *supra* at 193, 196; *Griffin v. Illinois*, *supra* at 17-18, 21-22. See also *Tate v. Short*, *supra* at 399. In our case, on the other hand, the State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established.¹⁴ This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. § 1423(1); likewise, California requires knowledge of the language for jury service, Cal. Code Civ. P. § 198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the State. Cal. Const. art. IV, § 24; Cal. Code Civ. P. § 185, and of the nation. Use of English in the schools has this firm foundation, while the requirement of money payments in the criminal system does not.

Because we find that the language deficiency suffered by appellants was not caused directly or indirectly by any State action, we agree with the judgment of the district court and distinguish this case from *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny of de

¹⁴ See note 11 *supra*.

jure cases. Under the facts of this case, appellees responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district.¹⁵ There is no evidence that this duty has not been discharged.

Appellants further complain that appellees have denied them equal protection by providing such remedial instruction as is made available on an unequal basis. Members of the first class of appellants receive no special help in English, while members of the second class are given compensatory instruction, some on a part-time and some on a full-time basis, and some through bilingual teachers and some with the ESL method.¹⁶

Both in the de jure cases and in the de facto cases (e.g., *Serrano v. Priest*, 5 Cal. 3d 548, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971)), the constitutional claim is predicated upon some form of State or governmental action, present or historical, which has created a classification asserted to be invidious and thus violative of the Fourteenth Amendment. The State has enacted laws creating separate schools based upon race, *Brown v. Board of Education*, *supra*, the State has passed laws for school financing favoring students in wealthy tax-base district, *Serrano v. Priest*, *supra*; laws for free text books which discriminate against the indigent, *Johnson v. New York State Education Department*, 449 F.2d 871 (2nd Cir. 1971). Here the State has established the schools, available to all without cost. The classification claimed invidious is not the result of laws enacted by the State presently or historically, but the result of deficiencies

¹⁵ *McLaurin v. Regents for Higher Education*, 339 U.S. 637 (1950), requires no more. There, a Black Ph.D. candidate, whom the segregated state university had admitted pursuant to court order, was assigned to a particular seat in the classroom in a row designated for Black students, to a Black table in the main reading room of the library, and to a specific table in the cafeteria. The Court held that these practices, violated the Equal Protection Clause, as it was defined before *Brown*. It ordered the school to accord the Black student the same treatment as other students in such matters. Appellees in the case before us have done no less.

¹⁶ Note 1 *supra*, and accompanying text.

created by the appellants themselves in failing to learn the English language. For this the Constitution affords no relief by reason of any of the Constitutional provisions under which appellants have sought shelter.

Furthermore, the determination of what special educational difficulties faced by some students within a State or School District will be afforded extraordinary curative action, and the intensity of the measures to be taken, is a complex decision, calling for significant amounts of executive and legislative expertise and nonjudicial value judgments.¹⁷ As with welfare, (to which these claims are closely akin), the needs of the citizens must be reconciled with the finite resources available to meet those needs. See *Dandridge v. Williams*, 397 U.S. at 472.

As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, subject only to the requirement that their classifications be rationally related to the purposes for which they are created.

Dandridge, *supra*, also tells us that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." 397 U.S. at 486-87. This echoes the language of *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969), that,

"a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire re-

¹⁷ Appellants would have the court direct the type of instruction to be afforded them for remedial purposes even though there is a dispute among the experts as to whether bilingual teachers are better for this purpose than those who teach English as a Separate Language. The courts should not be called upon to make pedagogic judgments.

medial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attached."

Accord, Schlib v. Kuebel, 404 U.S. 357, 364 (1971), *rehearing denied*, 405 U.S. 948 (1972); *Johnson v. Education Department*, 449 F.2d 871-77 (2d Cir. 1971); *Briggs v. Kerrigan*, 431 F.2d 967, 968-69 (1st Cir. 1970).

Judged by this standard, the administration of the compensatory education program for non-English-speaking Chinese children in the San Francisco Unified School District passes constitutional muster. Prior to the institution of this litigation, remedial instruction was provided as part of a pilot program.¹⁸ As such, emphasis would quite reasonably be on experimentation. Therefore, some children were given all their academic instruction within the program, and some were taken out of the regular school structure only part-time; some pupils were taught by bilingual teachers, and some received their instruction by the more intensive ESL method.¹⁹ Because of limited finances and the exploratory nature of the

¹⁸ In addition to the stipulated facts as to the numbers of Chinese and the portion of the total who need remedial help, the court found:

"Defendants [Appellees] recognize the importance of an education and equal educational opportunities, and make education available to plaintiffs [appellants] on the same terms and conditions as it is available to other groups within the School District."

"This Court recognizes that defendants have made efforts toward remedial education programs for Chinese-speaking students, although whether such efforts are effective or in need of substantial improvement is a conclusion which the Court does not make." C.T. at 419.

¹⁹ The record discloses that the 1,066 Chinese-speaking students who receive help (*supra*, footnote 1) consist of 487 Elementary School students (Grades 1-6 and Kindergarten), 342 Junior High School students and 237 Senior High School students. The 487 Elementary School students include a total of 45 who are of Kindergarten level. (C.T. at 239).

efforts, not all lingually deficient Chinese children took part.²⁰

With due regard to the nature of the School District's efforts, nothing before this court would indicate that the program has been managed so as to invidiously discriminate against appellants. We find that appellees have not violated appellants' rights to equal protection in the administration of the compensatory program for non-English-speaking Chinese students within the District.

The judgment is affirmed.

HILL, District Judge, dissenting:

I dissent.

In my view, the majority's construction of the Equal Protection Clause is too narrow. They fail to assign sufficient value and importance to the rights plaintiffs assert in this case. A child's right to an equal educational opportunity is of the greatest importance and should not be abridged without persuasive justification. No such justification was presented to the trial court because that court held, at the threshold, that the facts presented by plaintiffs failed to make out a claim upon which relief could be granted under the Equal Protection Clause. While apparently conceding that plaintiffs have suffered a disadvantage in gaining an education as against English-speaking pupils, the trial court held that the disadvantage did not come within the scope of the Equal Protection Clause. The majority agree with that basic holding.

I would reverse the judgment and remand the case to the trial court for the taking of further evidence on de-

²⁰ The Chinese Bilingual Education Budget of the San Francisco Unified School District for the period 1966-1971 reflects the following allocations for the program:

1966-67—	0
1967-68—	\$88,016
1968-69—	\$280,469
1969-70—	\$482,969
1970-71—	\$1,092,009

defendants' justification, if any, for their failure to provide the bilingual teaching which plaintiffs seek. The facts already adduced show, in my opinion, that the San Francisco School System withholds from a readily identifiable segment of an ethnic minority the minimum English language instruction necessary for that segment to participate in the educational processes with any chance of success. I view such a deprivation as being *prima facie* within the ambit of the Equal Protection Clause.

The plaintiffs, and the class they represent, are grade school children of Chinese parents who have recently immigrated to this country. The law requires these children to attend school; so, they come. But they enter the San Francisco School System unable to speak or understand the English language. All the instruction they receive is in English as are all of the books and all of the visual materials which are used. As the *amicus* brief from the Harvard University Center for Law and Education puts it, education for these children becomes "mere physical presence as audience to a strange play which they do not understand." These *amici* correctly stress the fact that the essence of education is communication: a small child can profit from his education only when he is able to understand the instruction, ask and answer questions, and speak with his classmates and teachers. When he cannot understand the language employed in the school, he cannot be said to have an educational opportunity in any sense. As against his English-speaking classmates, his educational opportunity is manifestly unequal even though there is an illusion of equality since the facilities, books, and teachers made available to him are the same as those made available to the rest of the students. It seems clear to me that a pupil knowing only a foreign language cannot be said to have an educational opportunity equal to his fellow students unless and until he acquires some minimal facility in the English language.

Interestingly enough, defendants themselves appear to recognize the seriousness of the problem. Two particularly forceful quotations from official publications of the San Francisco Unified School District are set forth below.

"(W)hen these [Chinese-speaking] youngsters are

placed in grade levels according to their age and are expected to compete with their English speaking peers, they are frustrated by their inability to understand the regular work. . . . For [these] children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto." San Francisco Unified School District, *Pilot Program: Chinese Bilingual*, (May 5, 1969), pp. 3a;6a, cited in Appellant's Opening Brief, p. 11.

"The immigrant family, in settling with its own people, has limited opportunities for assimilation into the American culture and language. Often, the immigrant student's only contact with the English language is during class time. After class, during lunch and recesses, the immigrant child tends to seek friends among other new arrivals. . . . In so doing, there develops a further bond of reinforcing the Chinese language. Few opportunities are afforded . . . for the student to speak English once he is back home in Chinatown." Dr. Robert E. Jenkins, Superintendent of Schools, San Francisco Unified School District, *Chinese Bilingual Education: A Preliminary Report* (1968), Clerk's Transcript, p. 244.

The majority misapprehend the nature of the relief sought in this case. They characterize plaintiffs as seeking "bilingual education." Plaintiffs have carefully and repeatedly abjured any such objective. As the complaint clearly states (Clerk's Transcript, pp. 23, 24) and as plaintiff's briefs in the trial court (Clerk's Transcript, p. 162) and in this Court re-emphasize, plaintiffs seek only that "defendants . . . provide special instruction in English and that such instruction . . . be taught by bilingual teachers." Appellant's Reply Brief, p. 12. When the majority emphasize that this is an "English-speaking nation" and that English is the "language of instruction" in all public schools, they set up a straw man which they have clothed in irrelevant truisms. Plaintiffs do not seek to be taught in Chinese, in whole or in part. They seek

only to learn English. They claim, with apparent justification, that they cannot learn English effectively unless it is taught to them by persons who have a facility in the only language they understand, i.e., Chinese. It seems abundantly clear that as soon as the plaintiffs have achieved enough proficiency in English to understand their teachers and classmates and participate somewhat in the course of instruction, they will expect no further Chinese to be uttered in their classes. They do not seek instruction in the Chinese language or to be taught anything in Chinese except how to speak English.

As stated, I am of the opinion that the facts (which are all stipulated to) reflect, *prima facie*, an impermissible infringement of plaintiffs' rights under the Equal Protection Clause. Plaintiffs have shown (1) that they do not have the same opportunity as others and (2) that the group so deprived is an identifiable segment of an ethnic minority.

As I understand the relevant legal principles, a *prima facie* denial of equal protection occurs whenever the method of classification with respect to the enjoyment or non-enjoyment of a governmental right, opportunity or obligation is "suspect." A classification is suspect whenever government action is linked with comparative disadvantage to members of a certain type of group. That group may be, *inter alia*, a religious, ethnic or political group or a group identifiable in terms of the members' sex or relative poverty.¹ Such classifications are suspect (and *prima facie* invalid) because these factors, i.e., religion, race, etc., are, except in extraordinary and rare instances, irrelevant and improper criteria in determining the scope or application of government rights, benefits, opportunities and obligations. They are suspect because, as one authority puts it, it is rarely the case that "proper governmental objectives . . . require for their achievement the carving out, for relatively disadvantageous treatment, of a class defined by [their racial or ethnic composition]." Michelman, *The Supreme Court 1968 Term—Forward*:

¹ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Chance v. Bd. of Examiners*, 458 F.2d 1167 (2nd Cir. 1972).

On Protecting the Poor Through the Fourteenth Amendment, 83 Har.L.Rev. 7, 21 (1969).²

When government action particularly affects or burdens a given class or group, it is often called "discrimination." It is important to remember that no *intent* to discriminate is required in order to invoke the Equal Protection Clause. One can deal with an apparently neutral and non-discriminatory statute or scheme which is applied or enforced without any intent to discriminate (or even without knowledge that the effect is a discriminatory one) and still run afoul of the Equal Protection Clause if illegal discrimination in fact results.³ When such action particularly affects or burdens one of the

² In addition to being apparently arbitrary or irrational, Professor Michelman characterizes a suspect classification as one which has a high potential for abuse or for use as a tool by which a minority can be systematically deprived of equal access to the right and benefits the society offers. Furthermore, the criterion has a potential to hurt or stigmatize a group by implying official recognition of the group's inferiority or undeservingness. See Michelman, *supra*, at 20.

³ As the Fifth Circuit states, *en banc*, in disposing of a Petition for Rehearing in the case of *Hawkins v. Town of Shaw, Miss.*, 437 F.2d 1286 (5th Cir. 1971):

"In order to prevail in a case of this type it is not necessary to prove intent, motive, or purpose to discriminate on the part of city officials. We feel that the law on this point is clear, for 'equal protection of the laws means more than merely the absence of governmental action designed to discriminate; . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme.' *Norwalk CORE v. Norwalk Redevelopment Agency*, 2 Cir. 1968, 395 F.2d 920, 921." *Hawkins v. Town of Shaw, Miss.*, *Petition for Rehearing*, 461 F.2d 1171 (5th Cir. 1972) at pp. 1172, 73. Furthermore, despite the fact that *Hawkins* arose in a situation where past historical discrimination could be inferred and where some evidence of present intent to discriminate was before the court, Judge Wisdom, in his concurrence in *Hawkins* on the Petition for Rehearing, makes clear that the case should "not be read to imply that our decision was based even in part on proof of motive, purpose, or intent," 461 F.2d at 1174. See also *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970), *cert. den.* 401 U.S. 1010 (1971); *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962); *Chance v. Bd. of Examiners*, 458 F.2d 1167 (2nd Cir. 1972).

classes or groups mentioned above, it is presumptively illegal discrimination. However, not all discrimination is illegal. Discrimination which is apparently illegal may be excused by a showing that the discrimination or classification is justified by overriding governmental objectives and necessities.

As Judge Feinberg, in *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972), states: "A harsh racial [or ethnic] impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug. At the very least, the Constitution requires that state action spawning such a classification 'be justified by legitimate state considerations.'" 458 F.2d at 1175.

The strength of the justification needed to overcome a *prima facie* violation of the Equal Protection Clause will vary depending on the nature of the right involved. When the right involved is a fundamental one, only a compelling state interest will justify its abridgment, and the discrimination must be necessary to the achievement of the overriding governmental interest. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1968); *Dunn v. Blumstein*, 405 U.S. 330 (1972). Cf. *Dillenburg v. Kramer*, — F.2d — (9th Cir. 1972). When the right involved is less fundamental, a less compelling reason may suffice to justify its abridgment, and the discrimination may be permitted as *rationally related* to the achievement of an overriding governmental aim. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970).

Turning now to the rights involved in this case, it cannot be doubted that the right to equal educational opportunity is one of the most vital and fundamental of all of the rights enjoyed by Americans. The Supreme Court, in *Brown v. Board of Education*, characterized it as "perhaps the most important function of state and local governments" and observed that "(i)n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493.

Thus, when defendants are given the opportunity to present their justification, their showing would necessar-

ily be required to be persuasive in the extreme. The present record certainly shows no such justification. At best, it indicates that the defendant school board has made some effort to remedy the language deficiency of some of the Chinese-speaking students. That partial effort is not a full justification. It merely goes to reduce the dimensions of the problem.

The defendants could be allowed to show, in the resumed trial, the limits of their resources, the conflicting demands made upon those resources, and their judgment as to the priorities to be applied to those resources and demands. And the court would then decide whether the defendants are justified in their refusal to provide bilingual instruction for the teaching of English to all of the Chinese-speaking pupils who require it.

The majority apparently foreclose plaintiffs from relief under the Equal Protection Clause because their language deficiency was not "caused directly or indirectly by any state action." In other words, the majority see the Equal Protection Clause as available only when the inequality or discrimination results from some present intent to discriminate or from some past or historical governmental discriminatory conduct for which the state can be blamed. The majority cite no previous decision which so limits the scope of the Equal Protection Clause. It is true that most, if not all, of the decided cases requiring remedial action to redress educational deprivation arose where there was a history of unequal treatment by the state of the class involved. But none of the opinions hold that historical disadvantage attributable to the state is a *sine qua non* for obtaining relief.

In another group of cases it is clear that relief is granted under the Equal Protection Clause where no historical blame can be placed upon the state. These cases deal with the obligation of the state to provide special services to criminal defendants who are unable to pay for those services themselves. Some of these Supreme Court opinions on the subject are collected in the footnote.⁴ These cases stand for the proposition that a

⁴ *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California*, 386 U.S. 738 (1966);

person's poverty may not be the basis for denying him the same facilities and aids in combatting criminal charges against him as are enjoyed by those who can pay for such facilities and aids with their own funds. Affirmative state action is required to redress the inequality, and the state's duty to redress is imposed without reference to whether or not it can be said that the state in some way caused the inequality in the first place. The state's duty to take affirmative action does not arise because it can be said that the state is primarily responsible for making a poor man poor. Rather, the duty arises because the state must put justice within reach of every man if the state chooses to provide a system of criminal justice at all. Similarly, when the state chooses to provide education and makes attendance at school compulsory, it has a duty to grant to each child an equal educational opportunity and a duty to avoid illegal discrimination. That duty does not arise because of the existence of either a present intent to discriminate or past historical discrimination. Rather, the duty arises because once the state chooses to put itself in the business of educating children, it must give each child the best education its resources and priorities allow.

One last word. The plaintiffs in this case are small, Chinese-speaking children who sue on their own behalf and on behalf of others similarly situated. The majority describe the plight of these children as being "the result of deficiencies created by the appellants themselves in failing to learn the English language." To ascribe some fault to a grade school child because of his "failing to learn the English language" seems both callous and inaccurate. If anyone can be blamed for the language deficiencies of these children, it is their parents and not the children themselves. Even if the parents can be faulted (and in many cases they cannot, since they themselves are newly arrived in a strange land and in their struggle

Roberts v. LaVallee, 389 U.S. 40 (1967). In *Roberts*, the Supreme Court stated that "(o)ur decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." 382 U.S. at 42.

for survival may have had neither the time nor opportunity to study any English), it is one of the keystones of our culture and our law that the sins of the fathers are not to be visited upon the children.

SUPREME COURT OF THE UNITED STATES

No. 72-6520

KINNEY KINMON LAU, a minor by and through

**MRS. KAM WAI LAU, his guardian ad litem,
ET AL., PETITIONERS**

v.

ALAN H. NICHOLS, ET AL.

On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the said motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 11, 1973

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 26,155

KINNEY KINMON LAU, a Minor, by and through
MRS. KAM WAI LAU, his Guardian ad Litem,
ET AL., APPELLANTS

vs.

ALAN H. NICHOLS, President, ET AL., APPELLEES

[June 18, 1973]

Before: CHAMBERS and TRASK, Circuit Judges, and
HILL,* District Judge

ORDER

On request of a member of the court who was not a member of the panel, proceedings were commenced in February 1973 to obtain a vote of the court to consider the case en banc.

All members of the court in active service have considered the request for en banc consideration. A majority of the court has rejected the request.

Judge Hufstедler, with whom Judge Ely concurs, files an opinion dissenting from the rejection of en banc consideration.

Judge Trask, with whom Judge Wright concurs, files a special concurring opinion.

HUFSTEDLER, Circuit Judge, with whom Judge Ely concurs, dissenting from the denial of hearing en banc:

I dissent from the rejection of en banc consideration. The case presents unusually sensitive and important con-

* For the Central District of California, sitting by designation.

stitutional issues. The majority opinion states principles of statutory and constitutional law that cannot be reconciled with controlling authority. Unless these principles are corrected now, the protections of the Civil Rights Acts will be seriously impaired in this Circuit.

The majority opinion correctly identifies the two groups of children who brought this action: (1) 1,790 Chinese school children who speak no English and are taught none, and (2) 1,066 Chinese children who speak no English and who receive some kind of remedial instruction in English. The majority's characterization of the relief sought as "bilingual education" is misleading. The children do not seek to have their classes taught in both English and Chinese. All they ask is that they receive instruction in the English language.

Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute. Their plight is not a matter of constitutional concern, according to the majority opinion, because no state action or invidious discrimination is present. The majority opinion says that state action is absent because the state did not directly or indirectly cause the children's "language deficiency", and that discrimination is not invidious because the state offers the same instruction to all children. Both premises are wrong.

The state does not cause children to start school speaking only Chinese. Neither does a state cause children to have black skin rather than white nor cause a person charged with a crime to be indigent rather than rich. State action depends upon state responses to differences otherwise created.

These Chinese children are not separated from their English-speaking classmates by state-erected walls of brick and mortar (*Cf. Brown v. Board of Education* (1954) 347 U.S. 483), but the language barrier, which the state helps to maintain, insulates the children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segre-

gated blacks in *Brown*; these children cannot communicate at all with their classmates or their teachers.

The state's response to the non-English speaking Chinese children is not passive. The state compels the children to attend school (Cal. Educ. Code § 12101), mandates English as the basic language of instruction (Cal. Educ. Code § 71),¹ and imposes mastery of English as a prerequisite to graduation from public high school (Cal. Educ. Code § 8573).² The pervasive involvement of the State with the very language problem challenged forbids the majority's finding of no state action. (*E.g.*, *Bullock*

¹ Cal. Educ. Code § 71:

"English shall be the basic language of instruction in all schools.

"The governing board of any school district and any private school may determine when and under what circumstances instruction may be given bilingually.

"It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that bilingual instruction may be offered in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is authorized to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

"Pupils who are proficient in English and who, by successful completion of advanced courses in a foreign language or by other means, have become fluent in that language may be instructed in classes conducted in that foreign language."

² Cal. Educ. Code § 8573:

"No pupil shall receive a diploma of graduation from grade 12 who has not completed the course of study and met the standards of proficiency prescribed by the governing board. Standards of proficiency in basic skills shall be such as will enable individual achievement and ability to be ascertained and evaluated. Requirements for graduation shall include:

(a) English.

(b) American history.

(c) American government.

(d) Mathematics.

(e) Science.

(f) Physical education, unless the pupil has been exempted pursuant to the provisions of this code.

(g) Such other courses as may be prescribed."

v. Carter (1972) 405 U.S. 134; *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715; *Shelley v. Kraemer* (1948) 334 U.S. 1; *Nixon v. Condon* (1932) 286 U.S. 73.)

The majority opinion concedes that the children who speak no English receive no education and those who are given some help in English cannot receive the same education as their English speaking classmates. In short, discrimination is admitted. Discriminatory treatment is not constitutionally impermissible, they say, because all children are offered the same educational fare, i.e., equal treatment of unequals satisfies the demands of equal protection. The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk.

The majority holdings are contrary to a cascade of Supreme Court authority. Although the majority opinion acknowledges the existence of many of these cases, it attempts to circumvent them by reducing state action concepts to levels unacceptable for a hundred years and by drawing distinctions to confine the prior cases to an uncharted jurisprudential territory remote from the San Francisco schools. The great equal protection cases cannot be shrivelled to the size the majority opinion has prescribed.

Even if the strict scrutiny test were inapplicable, the Chinese children made out a prima facie case. A claim of invidious discrimination against those who could speak and write only Chinese came to the Supreme Court almost 50 years ago in *Yu Cong Eng v. Trinidad* (1926) 271 U.S. 500. The Philippines had enacted a statute requiring business account books to be kept solely in English, Spanish, or any local dialect. The petitioner, a Chinese merchant who could neither speak nor write any language except Chinese challenged the statute on due process and equal protection grounds. The Philippine statute, like the California statutes here involved, was facially neutral. Mr. Chief Justice Taft, speaking for a

unanimous court, struck down the statute as a denial of equal protection.³

The classifications that are relevant to our equal protection problem in this case can be defined in a number of ways. It is unnecessary to describe more than three of them to structure the constitutional inquiry. The narrowest classification created by state action is this: (1) all Chinese school children in the district who can speak English versus (2) all Chinese school children in the district who cannot speak English and are taught no English, represented by a group of 1,790 plaintiffs. Children in the first class have full access to education; those in the second have none. The sole difference between them is linguistic. Is the denial of instruction to learn English—and hence to learn anything—rationally related to any legitimate state end? The state offers no rationale, and I am unable to discern any.

A second classification is: (1) all Chinese school children who do not speak English and are taught none versus (2) (a) children identically situated who receive six hours per day of special instruction, represented by a group of 433 plaintiffs, and (2) (b) children also identically situated who receive one hour per day of special instruction, represented by a group of 633 plaintiffs. Although some special education is provided, it is not made available to all on an equal basis. See *Brown v. Board of Education* (1954) 347 U.S. 483; *Griffin v. Illinois* (1956) 351 U.S. 12.) Nothing appears on the face of the record to explain why children are placed in one class rather than another. It is thus impossible to deter-

³ In our case, unlike *Yw Cong Eng*, there is no indication that California intended the language statutes to injure Chinese. But it is now abundantly clear that good faith is irrelevant if in fact the impact of state action is discriminatory. *E.g.*, *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715, 725; *cf.* *Baker v. Carr* (1962) 369 U.S. 186. California's record of deliberate discrimination against Chinese and Japanese is nevertheless lengthy. One of the sadder chapters in that melancholy history was an order of the San Francisco school board in October, 1906, compelling all Oriental children to attend a segregated school in Chinatown. The order was ultimately withdrawn under pressure of litigation, of Congress, and of the President of the United States. *McWilliams, Prejudice* p. 26 (1944).

mine whether the basis of distinction has any rational connection to any legitimate state aim.⁴

A third classification is: (1) all Chinese non-English speaking children who receive some remedial tutelage in English versus (2) all of their classmates who speak English. It is conceded that children in the first class have much narrower access to education than children in the second. Is there a rational basis for declining to bridge the educational gap between the two classes? Again the state has not been required to supply one, and there is no showing in the record that those children, or any portion of them, in the first class are afforded a meaningful opportunity to a minimum public education. Here, as in *Bullock v. Carter* (1972) 405 U.S. 134; *Reed v. Reed* (1971) 404 U.S. 71; *Tate v. Short* (1971) 401 U.S. 395; *Williams v. Illinois* (1970) 399 U.S. 235; *Douglas v. California* (1963) 372 U.S. 353; *Griffin v. Illinois* (1956) 351 U.S. 12; *Brown v. Board of Education* (1954) 347 U.S. 483; *Yick Wo v. Hopkins* (1886) 18 U.S. 356, the state has participated in discriminating against a clearly identifiable class and its failure to remedy the discriminatory practice has not been justified at all.

The state did not meet even its minimal burden. But its obligation was to meet the far more stringent test of strict scrutiny. The Chinese children have met *prima facie* even the rigorous standards of *San Antonio Independent School District v. Rodriguez* (1973) — U.S. —: (1) They are members of a class precisely identifiable, (2) the state has participated in discriminating against them, (3) the children who speak no English and are taught none are absolutely deprived of education and it has not been shown that those who are taught some English have a meaningful access to an adequate education. *San Antonio Independent School District v.*

⁴ This is not a case like *Dandridge v. Williams* (1970) 397 U.S. 471 where there was a clear basis for distinguishing between welfare recipients stated in the regulation at issue. The requirements of *Dandridge*—"It is enough that the State's action be rationally based and free from invidious discrimination." (*Id.* at 487)—have not been met in this case.

Rodriguez is the most recent pronouncement in a lengthy chain of equal protection cases. But even if it stood alone, *San Antonio Independent School District* would compel reversal.

TRASK, Circuit Judge, with whom Judge Wright concurs, specially concurring in the rejection of en banc consideration:

A basic misapprehension of the factual situation seems to color, if not pervade, the dissent from the court's refusal to grant en banc consideration. This appears from the statement that "the majority opinion concedes that the children who speak no English receive no education. . . ." The stipulation upon which the case was submitted for decision [footnote 1 of majority opinion] refers to 2,856 Chinese-speaking students in the school district "who need special instruction in English." It continues by dividing those students into one group who receive designated amounts of special help in English and those who do not. Those who do not, however, are not assumed "to receive no education." Although some do not receive special help, there is no indication that they are not exposed to whatever English courses are afforded. The majority opinion does not equate the need for "special help" in English with receiving "no education."

Little comfort for the dissent may be found in *San Antonio Independent School District v. Rodriguez*, 41 U.S.L.W. 4407 (Mar. 21, 1973). Although the Chinese here were an identifiable group "who needed special help in English" [Stipulation, footnote 1], they were a small portion of approximately 15,500 Chinese students. It is not difficult to assume that they were part of an even larger group of students "who need special help in English." As the Court, where wealth is involved, "require absolute equality or precisely equal advantages." Continuing,

"Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense." 41 U.S.L.W. at 4414.

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OCTOBER TERM, 1972

No.

MISC.

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**BRIEF AMICUS CURIAE OF THE CENTER FOR
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IN SUPPORT OF THE PETITION**

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1972

No. Misc.

**KINNEY KINMON LAU, A Minor by and through
MRS. KAM WAILAU, his guardian ad Litem, et al.,**

PETITIONERS,

v.

ALAN H. NICHOLS, et al.,

RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF AMICUS CURIAE OF THE CENTER FOR
LAW AND EDUCATION, HARVARD UNIVERSITY
IN SUPPORT OF THE PETITION**

Introduction

We present this brief in support of the petition for a writ of certiorari with the consent of all parties, pursuant

to Supreme Court Rule 42(1). Copies of the letters of consent are attached to our covering letter to the Clerk of this Court. We rely on the petitioners' treatment of this Court's jurisdiction, the questions presented for review, constitutional and statutory provisions involved and statement of the case.

The unreported order of the district court denying petitioners' motions for injunctive and declaratory relief and finding for the respondents on the merits is found at petitioners' motions for injunctive and declaratory relief and Court of Appeals affirming the district court's decision, District Judge Hill dissenting, is reported at 472 F.2d 909 (9th Cir. 1973).

Interest of Amicus Curiae

The Center for Law and Education, Harvard University, was created jointly by the Harvard Law School and the Harvard Graduate School of Education in 1969. The Center is funded by the United States Office of Economic Opportunity to work in conjunction with local legal service offices and other attorneys to promote reform in American education by working in the area of social policy and the law, especially on behalf of the poor. The Center's attorneys have concentrated on problems in the following areas: resource allocation, within and between school districts; racial discrimination; federal programs; "ability grouping"; excluded children; and bilingual education. Center personnel have participated in litigation, including the preparation of several amicus briefs; done research and writing; drafted legislation; and negotiated with public officials. The Center publishes a bulletin entitled *Inequality in Education*.

The Center has, during the past two years, become increasingly involved in the problems of minority children

who because of their linguistic and cultural background are not receiving the benefits of education. The Center's concern has led to extensive participation by Center attorneys in drafting the Massachusetts Transitional Bilingual Education Act, Massachusetts Acts and Resolves, ch. 1005 (November 4, 1971). That legislation, the first state-wide compulsory bilingual education program ever enacted, provided for a transitional training period of education in the bilingual child's native language during which period the child would learn English language skills appropriate to his or her grade level. Center attorneys have also been extensively involved in litigation concerning the educational problems of non-English speaking children with one attorney devoting full time to the educational problems of American Indian children, and the Court of Appeals opinion in this case referred to the *amicus curiae* brief filed by the Center, 472 F.2d 909, 911, 914-15, 919.

The Center's work has given us experience in evaluating the constitutionality of educational practices. In addition, the Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which is material under governing legal principles. In this brief we present educational data bearing on the educational harm which plaintiffs now suffer as the result of the defendants' educational policies as well as a discussion of cases in the education law area which bear on this action.

Our recent sampling of neighborhood legal service offices indicates that over 20 such offices are presently actively involved in litigation concerning the educational rights of non-English speaking poor children. This demonstrates that equal educational opportunities for non-English speaking children are a matter of substantial concern to the poor. Therefore, the filing of this brief permits

the Center to present an argument on a matter substantially affecting the quality of education afforded the poor.

Reasons for Granting the Writ

A. THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

This case concerns the meaning of "equal educational opportunity" as it applies to the linguistic exclusion of 1800 non-English speaking Chinese students from the educational process in the San Francisco schools. That their exclusion is both severe and unconstitutional will be the main thrust of this brief. What must be made clear at the outset, however, is that the issue involved in this case is one of great importance to the Nation as a whole and particularly to millions of non-English speaking minority group children.¹

Recently the United States Senate Select Committee on Equal Educational Opportunity completed three years of investigation into the way American public education serves minority group children. In its final report the

¹ The U.S. Department of Health, Education and Welfare has estimated that there may be five (5) million public school children in the country who speak a language other than English in their homes. U.S. Department of Health, Education and Welfare, "Draft: Five-Year Plan, 1972-77: Bilingual Education Program" (August 24, 1971). Among those directly affected by the decision below are many of the approximately 740,000 Spanish surnamed students in Arizona, California, Idaho, Montana, Nevada, Oregon and Washington — or 37% of the total number of Spanish surnamed students in the United States. United States Commission on Civil Rights, Mexican American Education Study (April, 1971) p. 16. Also affected will be many of the 64,000 American Indian children in those states — approximately 33% of the total number of Indian students nationally. Report of the Committee on Labor and Public Welfare and Committee on Interior and Insular Affairs, S. Rep. No. 92-384, 92d Congress, 1st Sess. (1971), at 23-24.

Committee stated: "It is the conclusion of this committee that some of the most dramatic, wholesale failures of our public school systems occur among members of language minorities . . . [w]hat these conditions add up to is a conscious or unconscious policy of linguistic and cultural exclusion and alienation."²

The findings of the Senate Committee are amply buttressed by the weight of expert educational opinion. Thus the evidence indicates that children between the ages of five and seven use language at an accelerating rate for purposes of problem-solving. When ideas are being formed in one language, it is difficult to state them in another, and the child's unsuccessful attempts at translation may lead to great frustration and loss of interest in expressing ideas.³ When a school instructs in a second language be-

² Report of the Select Committee on Equal Education Opportunity, S. Rep. No. 92-000, 92d Cong., 2d Sess. (1972), at 277. The Committee found that twenty-three percent of the total school enrollment in New York City is made up of Puerto Rican children. Yet in 1963 only 331 of 21,000 (1.6%) "academic" diplomas granted in New York went to such children. Hearings Before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2nd Sess., pt. 8, at 3726 (1970). In other cities the picture is no brighter. In Newark, for example, there were 7,800 Puerto Rican students in the public school system but only 96 survived to the 12th grade while in Chicago the dropout rate among Puerto Rican students approached sixty percent. *Id.* at 3685. Among Mexican Americans the language barrier poses equally severe educational difficulties. Some fifty percent of this group never go past the eighth grade. In Texas, for instance, forty percent of the Spanish-speaking citizens are described as "functional illiterates." *Id.* at Part 4, 2400.

And among Cherokee Indians the school dropout rate runs to seventy-five percent with illiteracy among adults at forty percent. Report of the Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, S. Rep. No. 501, 91st Cong., 1st Sess. (1969), at 19.

³ See Vera P. John and Vivian M. Horner, *Early Childhood Bilingual Education* (Modern Language Association of America, 1971), 171; Joan T. Feely, "Teaching Non-English Speaking First Graders to Read," *Elementary English* (1970), 207; Anne Anastasi and Fernando A. Cordova, "Some Effects of Bilingualism Upon The Intelligence Test Performance of Puerto Rican Children in New York City," *The*

fore a child has developed adequate cognitive skills in his native language, the child may become a "non-lingual" whose functioning in both his native and second language develops in only limited ways.

And while the literature is not conclusive as to the age at which a child should attempt to learn a second language, it is significant that no support could be found for simply allowing non-English speaking youngsters to sit, uncomprehending in the classroom as is the case here.

Yet this Court needs no expert opinion to understand the reason why millions of linguistic minority group children do not succeed in our public schools. For education is, in its essence, an "exchange of ideas which discovers truth . . ." and "the classroom is peculiarly the 'marketplace of ideas.'" *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 599, 603 (1967). To deny to one class of children the chance to communicate ideas, to speak with classmates, to ask questions and comprehend answers, to receive instruction from teachers must necessarily place that class of children at a severe educational disadvantage. That that disadvantage makes for educational opportunities unequal to those of majoritarian students who come from English speaking homes is patently obvious. That this is the case when it need not be so, that petitioners could have the same opportunity for educational success as English-speaking students is part of a national tragedy. That the respon-

Journal of Educational Psychology, Vol. XLIV (1953), 15, 16; Sheldon H. White, "Some General Outlines of the Matrix of Developmental Changes Between Five and Seven Years," *Bulletin of the Orton Society* (1970), 20, 41-57. John MacNamara, "Effects of Instruction in a Weaker Language," *The Journal of Social Issues*, Vol. XXIII (1967), 22, 132; Sheldon H. White, "Evidence for a Hierarchical Arrangement of Learning Processes," in L. P. Lipsett and C. C. Spiker, eds., *Advances in Child Development and Behavior*, Vol. II (New York: Academic Press, 1965).

dents have denied them that opportunity requires this Court to review the decision of the Court below.

B. THE COURT OF APPEALS DECIDED FOURTEENTH AMENDMENT ISSUES IN A WAY IN CONFLICT WITH DECISIONS OF THIS COURT.

1. The Decision Below Improperly Constricts This Court's Rulings in *Sweatt v. Painter*, 339 U.S. 629 (1950), *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) and *Brown v. Board of Education*, 347 U.S. 483 (1954).

In its discussion of *Brown v. Board of Education*, 347 U.S. 483 (1954) the Court below has supplied to *Brown* a meaning so narrow as to gut that case of both its historical and logical essence. For the majority of the Court of Appeals panel, *Brown* meant only that state enforced segregation was no longer to be allowed and hence in this case that "... the Equal Protection Clause extends no further than to provide [children who speak no English] ... the same facilities, textbooks, teachers and curriculum as is provided to other children in the district." *Lau v. Nichols*, 472 F.2d 909, 916, (9th Cir. 1973).

Certainly one important basis for *Brown* was that compulsory racial separation is *per se* discriminatory against black people. This is so because "[s]egregation in public education is not reasonably related to any proper governmental objective ..." and thus imposes an arbitrary and invidious classification upon those subject to the segregation.

We believe however, that the concept of equal educational opportunity as it has been developed in the decisions of this Court must also embrace any regimen of

⁴ *Bolling v. Sharpe*, 347 U.S. 498, 500 (1954)

compulsory public education which by its nature denies to an identifiable ethnic minority group the same chances for classroom success as is afforded the majority of its students. To reach any other conclusion would be to ignore the very rationale which this Court used in reaching its decision in *Brown*.

In *Brown* the Court was faced with racial segregation of students in a setting in which, "the Negro and white schools involved have been equalized . . . with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *supra* at 492. Refusing to limit its inquiry to such "tangibles" the Court began its analysis with a discussion of earlier cases in which black graduate students had been denied equal educational opportunities. The Court said:

In *Sweatt v. Painter*, *supra* [339 U.S. 629, 70 S. Ct. 850], in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, *supra* [339 U.S. 637, 70 S. Ct. 853], the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: " . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

The Court continued, "[s]uch considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect

their hearts and minds in a way unlikely ever to be undone." *supra* at 493. Thus the Court made it clear that any analysis of equal educational opportunity would look behind mere surface equality of facilities to the crucial, often intangible, factors which go to make up the educational experience. When one racial group was systematically deprived of opportunities to enjoy such intangible factors the existence of some other equality of facilities was irrelevant. In *McLaurin v. Oklahoma State Regents*, *supra* the fact that the appellant "uses the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned in these rooms have any disadvantage of location" did not deter the Court from finding an Equal Protection denial in restrictions which impaired the appellant's ability to study and engage in discussions. Here the mere surface equality of "facilities, textbooks, teachers and curriculum" cannot foreclose this Court from looking at the absolute impairment of these non-English speaking childrens' ability to function in their classroom society. Indeed in many ways the deprivation of educational opportunity suffered by these petitioners is so severe that one could argue that *Sweatt* and *McLaurin* standing alone compel reversal of the Court below. In any event it is difficult to understand how one can read the reliance on those earlier cases in *Brown* and still apply an Equal Protection analysis which ignores the reality of inequality which the school system itself has recognized.⁵

⁵ Although the opinion below is the first instance we are aware of in which a lower Federal court has ignored the *Brown* findings of denial of equal educational opportunity, attempts to limit *Brown* are not unknown. In *U. S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (1967), *cert. denied sub nom. Caddo Parrish School Board v. United States*, 389 U.S. 840 (1967) the Court was faced with a construction of *Brown* which focused only on the harmful consequences of segregation. In making clear that segregation was *per se* prohibited by

2. *The Decision Below Ignores The Respondents' Responsibility For The Lack Of Equal Educational Opportunity Being Suffered By The Petitioners.*

According to the Court of Appeals, "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system." *Lau v. Nichols*, *supra* at 915. Thus the Court reasoned these children's inability to function in the classroom stems from their failure to learn English before reaching the schoolhouse and not from any state action by the respondents. The issue for the purpose of Equal Protection analysis, however, is not what advantages or disadvantages these children bring to the starting line but whether the rules of the race create an unequal chance for success for certain national origin groups. And it is the respondents who have knowingly made the rules which guarantee that these Chinese speaking children will compete with a handicap which is absolute, arbitrary and unrelated to the goals of public schooling. For what respondents have done is create two classifications of students—those from English speaking ethnic backgrounds who will be able to comprehend the language of the classroom and those from non-English speaking minority groups who will

the Equal Protection Clause the Court stated that: "The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision." *supra* at 871. Here the Court below has implicitly concluded that the finding of harmful consequences constituted no part of the basis for the *Brown* decision. Such a result would render meaningless the concept of equal education opportunity for non-English speaking minority group children. And as the Court in *United States v. Jefferson County Board of Education*, *supra* refused to interpret *Brown* narrowly to the detriment of black children, this Court must not acquiesce in an even more cramped view of *Brown* as it affects other minority children.

neither understand the language of instruction nor be given any help in learning that language. The standard by which such classifications are to be judged will be discussed below in section 3. However it cannot seriously be contended that the respondents have no responsibility for these classifications.

Thus the school system has made a choice not to teach these petitioners how to speak English. That the respondents have other choices is clear. Instruction in how to speak English for non-English speaking students is routinely conducted in many schools throughout this country.⁶ Indeed San Francisco must be aware of some of the many possible instructional techniques from its own Chinese Bilingual Pilot Program. That nearly 1800 non-English speaking Chinese students receive *no* such instruction necessarily results from a choice by the respondents to deny them the benefits of *any* of these several instructional methods. Thus in setting priorities and allocating resources respondents have guaranteed the result which they themselves have recognized—that non-English speaking Chinese students become part of a separate class of children “frustrated by their inability to understand the regular classwork (and for whom) the lack of English means poor performance in school.”⁷

⁶ For instance, see the techniques developed in programs described in U.S. Department of Health, Education and Welfare, *PREP Report No. 31, Early Childhood Programs for Non-English Speaking Children* (1972); U.S. Department of Health, Education and Welfare, *Model Programs — Compensatory Education Series* (1972); U.S. Department of Health, Education and Welfare, *Profiles in Quality Education* (1968).

⁷ [W]hen these [non-English-speaking Chinese] youngsters are placed in grade levels according to their age and are expected to compete with their English speaking peers, they are frustrated by their inability to understand the regular classwork . . . for [these] children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto.

And while we agree with the petitioners that the Court below was in error in thinking that discriminatory intent is necessary to a finding of denial of equal educational opportunity,⁸ it seems clear that the classification knowingly created by the respondents' refusal to provide any language instruction to these petitioners comes very close to the kind of process which courts have found to be legally indistinguishable from intentional discrimination.⁹

3. *The Decision Below Failed To Give Adequate Weight To The Fact That Petitioners' Disabilities Are Suffered As Members Of A Distinct Ethnic And National Origin Group.*

The decision below makes no mention of what standard of review the Court of Appeals employed in its Equal Protection analysis. Nonetheless, this Court for nearly 100 years has not hesitated to look behind a facially neutral state law when the burden of such law was felt by one

San Francisco Unified School District, *Pilot Program: Chinese Bilingual*, pp. 3A, 6A (May 15, 1969), Plaintiffs' Exhibit No. 5.

The Courts have recognized the Constitutional implications of the educational harms suffered by non-English speaking children. In *Diana v. State Board of Education*, Civil Action No. C-7037 RFP (N.D. Cal. Feb. 2, 1970) and *Guadalupe Organization v. Tempe Elementary School District No. 3*, No. Civ. 71-435 (D. Ariz., Jan. 24, 1972), plaintiffs alleged improper classification in English. As a result, Spanish-speaking youngsters with normal or above normal intelligence were receiving the limited instruction afforded the mentally retarded. In both cases, the parties reached agreements which were adopted as orders of the court alleviating the misclassifications. cf. *U. S. Ex Rel Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970).

⁸ Mr. Justice Stewart has stated that a state's actions in this context will be judged by its "purpose or effect." *San Antonio Independent School District v. Rodriguez*, 41 U.S. Law Wk. 4407, 4425 (1973). (Concurring opinion of Mr. Justice Stewart) (emphasis added).

⁹ "When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission." *Davis v. School District of City of Pontiac*, 309 F. Supp. 734, 741 (D.C. Mich., 1970), *affirmed*, 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971).

particular ethnic or national origin group. In *Fick Wo v. Hopkins*, 118 U.S. 356 (1886) the Court found in the actual effect of San Francisco's laundry licensing ordinance a denial of the protection of equal laws to Chinese laundrymen.¹⁰ In *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), a Philippines ordinance required the keeping of business account books in English, Spanish or a local dialect. Despite the obvious usefulness of the ordinance in assisting local tax collection and auditing, the Court focused on the discriminatory impact which the ordinance had on Chinese merchants, an impact which was found to deny them Equal Protection of the laws.

In *Fick Wo*, *supra*, *Yu Cong Eng*, *supra*, and other national origin cases, the Court showed a willingness to study the actual impact of the questioned ordinances which we now refer to as "close judicial scrutiny," *Graham v. Richardson*, 403 U.S. 365, 371 (1971).¹¹

And only recently in *San Antonio Independent School District v. Rodriguez*, 41 U.S. Law Wk. 4407 (1973) the Court indicated its willingness to apply close scrutiny when presented with a class defined by the "traditional indicia of suspectness," *supra* at 4415, see also the concurring opinion by Mr. Justice Stewart, *supra* at 4425. As the cited cases make clear, national origin is such a class.

Moreover, the impact of this classification upon Chinese students is not a mere coincidence. For the Chinese have long been "subjected to [such] a history of purposeful unequal treatment," *supra* at 4415, treatment which bur-

¹⁰ Even earlier Mr. Justice Field found that an ordinance providing for uniform one inch haircuts for male prisoners placed an unequal and hence unconstitutional burden on Chinese Queue wearers — this although the ordinance was defended on both sanitary and security grounds. *Ho Ah Kow v. Nunan*, 12 F.Cas. 252 (C.C.D. Cal. 1879).

¹¹ Other cases have developed the principal that national origin classifications are "suspect" thus calling for "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1945), *Oyama v. California*, 332 U.S. 633, 644-46 (1948).

dened them in schools as well as business and which often focused on their language as the crucial aspect of their ethnicity enabling discriminatory burdens to be imposed.

"Historically, California provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved in *Brown v. Board of Education*..." *Lee v. Johnson*, 92 S. Ct. 14, 15 (1971) (Per Douglas, J. as Circuit Judge on application for stay). Thus, until repealed in 1947¹³ (1947 Cal. Stats. c. 737 §1) the California Education Code provided for the racial separation of Chinese school children. As the California Supreme Court recently noted in *Castro v. State*, 85 Cal. Rptr. 20, 466 P. 2d 244 (1970) fn. 11, prejudice against the Chinese in California has at times been rampant. In *People v. Hall*, 4 Cal. 399, 404-405 (1854) Chief Justice Murray described plaintiffs' race as follows:

... a distinct people whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown: differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference...

Not only were the Chinese the object of legislative and

¹³ And "In the *Guey Heung Lee* case it was apparent that the force of that custom had not been spent even though the statute providing for the establishment of separate schools had been repealed, because the San Francisco school board continued meticulously to draw racial lines in spite of the repeal of the statute." *Gomperts v. Chase*, 92 S.Ct. 16, 17 (1971) (Per Douglas, J. as circuit justice on application for preliminary injunction). For a history of the segregation of the Chinese in the California public schools see Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850-1870* (Harvard University Press, 1971), Charles C. Dobie, *San Francisco's Chinatown* (D. Appleton-Century Co., 1936), and Charles Wollenberg, *Ethnic Conflict in California History* (Tinnon-Brown, 1970).

judicial scorn, but early on, their language was seized upon by those who would impose disabilities upon them. For instance, the California Constitution of 1879 excluded Chinese immigrants from voting. When it later appeared that the children of the original Chinese immigrants might qualify as voters, the legislature passed an English-only literacy test as a voting requirement. See *Castro v. State*, *supra* at fn. 11.

And at the same time as statutes provided for the segregation of Chinese students in schools, other statutes provided for the segregation of their language. Indeed until the current version of the California Education Code §71 was enacted in 1967 the teaching by languages other than English was prohibited.¹³

In finding no link between this past history and the present classroom situation of the petitioners, *Lau v. Nichols*, *supra* at 914-15, the Court below ignored the relevance of historical national origin discrimination as a determinant of the proper standard of review for Equal Protection purposes.

4. *No Rational Basis Has Been Shown For Respondent's Failure To Provide Petitioners With The Tools of Education.*

Because of respondent's failure to teach English to the petitioners, the public schools of San Francisco may be fairly described as rewarding those children who come from English speaking homes and penalizing those children who do not. The reward for the English speakers is comprehensible education—teachers, books, questions, ideas,

¹³ See, e.g., 1943 California Education Code § 8251: "All schools shall be taught in the English language." See generally Harold R. Isaacs, *Scratches on Our Minds* (John Day, 1958) for a description of American attitudes toward the Chinese.

communication which can be understood. The penalty for those from Chinese speaking homes is the deprivation of these essentials of schooling. Those from English speaking homes become the "actors" while the Chinese students are relegated to mere physical presence as audience to a strange play which they do not understand.¹⁴ This reward system can only be rational, however, if the state has a legitimate purpose in teaching English and other subject matter only to those of its students who come from English speaking national origin groups. No such purpose has been suggested.

Conversely, the application of a single "equal" standard to "unequal" individuals makes sense only in so far as the basis for applying the standard is a common characteristic of those individuals rationally related to the state's objective. Here mere physical ability to sit in a classroom seat together with English speaking pupils is used as the basis for forcing petitioners to submit to teaching which they cannot possibly understand. Unless the purpose of education is somehow reduced to detaining petitioners for a certain number of hours each day in a classroom, the application to them of teaching geared to children who already speak English is irrational, arbitrary and invidious classification.¹⁵

¹⁴

射箭要看靶子, 弹琴要看听众.

¹⁵ The Due Process clause also may be offended when compulsory school attendance is coupled with a denial of educational opportunities. *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C., 1972). Compare *Inmates of Boys' Training School v. Afleck*, 346 F. Supp. 1354 (D.R.I. 1972) (Due process violation in failure to provide rehabilitation and education for juvenile inmates), with *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala., 1971) (right to treatment in mental institutions).

Conclusion

For the reasons expressed in this brief and in the petition, this Court should agree to review the decision of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

MARIAN WRIGHT EDELMAN

J. HAROLD FLANNERY

ROGER L. RICE

*Center for Law and Education
Harvard University*

April, 1973

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, *et al.*,
Petitioners,
v.

ALAN H. NICHOLS, *et al.*,
Respondents.

**BRIEF FOR THE NATIONAL EDUCATION
ASSOCIATION AND THE CALIFORNIA TEACHERS
ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

INTEREST OF THE AMICI CURIAE

All parties have consented to the filing of this brief on behalf of the National Education Association and the California Teachers Association as amici curiae in support of the petition for a writ of certiorari.¹

The National Education Association ("NEA") is an independent voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. NEA

¹ The consents of both the petitioners and the respondents are being filed with the Clerk of the Court in accordance with Rule 42(2) of the Rules of the Court.

was founded in 1857, chartered by Congress in 1906, and has over one million one hundred thousand members. The California Teachers Association ("CTA"), the California state affiliate of NEA, has over 140,000 regular members. One of the principal purposes of the NEA and the CTA is to promote the education of American children. 34 Stat. 805.

The interest of the *amici curiae* in this case stems from that purpose. The case presents the question whether the Equal Protection Clause of the Fourteenth Amendment² permits a public school system to instruct non-English-speaking children all day in classes taught in English, without making any effort to assist the children in learning English, thus effectively excluding many of the children from the benefits of public education. The NEA and the CTA are concerned with the plight of non-English-speaking students trapped in schools where they cannot learn, and in 1972 the Representative Assembly of NEA adopted a formal continuing resolution urging the provision of "necessary funds and . . . material . . . for students to whom English must be taught as a second language." NEA 1973 Handbook, at 55. But the court below, asserting that the children's problem is

² The case also presents the question whether the practices of respondents, who receive federal aid (Def. Ans. to Int., Ex. B), violate Title VI of the Civil Rights Act of 1964, which provides that no person in the United States shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" because of his "race, color or national origin." 42 U.S.C. 2000d. We think it clear that the effective exclusion of a group of children identifiable by national origin—as non-English-speaking children are—violates the 1964 Act, a view supported, we note, by HEW regulations. See HEW, "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11595 (Ptn. 3, 26a). Accordingly, we support Petitioners' contentions regarding the 1964 Act (Ptn. 16). In this memorandum, however, we confine ourselves to the Equal Protection question.

"the result of deficiencies created by [the children] themselves in failing to learn the English language" (Ptn. 12a)

held that the requirements of the Equal Protection Clause are satisfied as long as the school system provides the children

"with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district." (Ptn. 11a.)

That holding sanctions the effective exclusion from public education of a substantial number of non-English-speaking school-age children in the United States today. The practical exclusion of any large group of children from public education, because of factors for which the children themselves are not responsible, is a matter of the gravest concern to those who, like the amici, are interested in the education of American children.³

REASONS FOR GRANTING THE WRIT

1. Under the decision below, several million children can be denied the benefits of public education.

Petitioners represent 1790 Chinese-speaking children who live in San Francisco, who need help in learning English in order to benefit from the classroom programs they are required to attend, and who receive no such instruction. They are required to sit uncomprehendingly in classes in which they cannot participate and from which they cannot benefit—classes designed only to meet

³ The NEA and its State affiliates have participated as *amici curiae* in numerous cases before this Court involving the provision of equal educational opportunity. *E.g.*, *School Board of the City of Richmond, et al. v. State Board of Education, et al.*, No. 72-549; *Keyes, et al. v. School District No. 1, et al.*, No. 71-507; *San Antonio Independent School District v. Rodriguez*, 41 U.S.L.W. 4407 (Mar. 21, 1973).

the educational needs of English-speaking children in San Francisco. Unless and until these 1790 children somehow manage to learn English without professional assistance, they will be excluded, through no fault of their own, from the opportunity for an education that the state offers all their peers. As the district court observed, "They are not studying and they are not learning . . . , you can't call them students. They need something, and that something is language instruction." (Tr. 18.)⁴

✓ These 1790 children in San Francisco are but a tiny fraction of the non-English-speaking children in the United States who need to learn English before they will be able to understand what is being taught in their classrooms. According to the United States Commissioner of Education, there are more than 5 million non-English-speaking school-age children in the United States who need instruction in the English language if they are to benefit from the curriculum of the school districts in which they reside.⁵ To deprive these children of such instruction is to deprive them of the opportunity for an education that is provided for their peers. The lower court's decision authorizes such a deprivation.

The importance of the issues involved in the case is confirmed by the fact that they are not confined to this case alone but are also the subject of other recent litigation. In *Serna v. Portales Municipal Schools*, No. 8994 Civil, Nov. 14, 1972, the United States District Court for

⁴ A similar situation exists with respect to Spanish-speaking children in San Francisco. The record indicates that there are nearly two thousand Spanish-speaking children in San Francisco who need special instruction in English, of whom only one-third receive such instruction. (Def. Ans. to Pl. Int. 18.)

⁵ Testimony of Dr. Sidney Marland, U.S. Commissioner of Education, Hearings Before Subcommittee of the House Committee on Appropriations, 92nd Cong., 2d Sess., at 677 (Feb. 28, 1972).

New Mexico held that the "promulgation and institution of a program by the Portales School District which ignores the needs of [Spanish-speaking] children" constitutes impermissible state action under the Equal Protection Clause.⁶ On the other hand, in *Morales v. Shannon*, No. DR-70-VA-14, Feb. 13, 1973, the United States District Court for the Western District of Texas expressed a contrary view, relying on the decision of the Ninth Circuit in this case.⁷

Moreover, the effects of the decision below are not limited to the 5 million non-English-speaking children. The court below held that the school system's responsibility to the petitioners under the Equal Protection Clause

"extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district." (Ptn. 11a.)

If that is so, it would be permissible to expect blind children to read textbooks they cannot see and to require deaf children to understand lectures they cannot hear as long as the textbooks and the lectures were the same as those "provided to other children." Similarly, school authorities could ask children in wheelchairs to make their own way to classrooms accessible only by

⁶ See also *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex., 1971), *aff'd*, 466 F.2d 518 (5th Cir., 1972) (ordering bilingual education as an aid to the elimination of the effects of past segregation).

⁷ *Morales* differs from the case at bar in that the plaintiffs in *Morales* claimed that under the Fourteenth Amendment they were entitled to a particular kind of program, specifically, a "bilingual" program, to deal with their English language deficiencies. The petitioners in the case at bar are making no such contention in this Court. Rather, they contend only that leaving them without any assistance in comprehending what goes on in their classrooms denies them their constitutional right to an equal opportunity for education.

climbing a flight of stairs—as long as they were the same facilities “provided to other children.” Under the decision below, all such children constitutionally can be denied the benefits of public education.*

2. The decision below will affect petitioners' ability to participate in the political and economic life of the nation.

The decision below sanctioned the refusal of school authorities to teach English to petitioners. The adverse impact of that decision cannot be overestimated. The court below recognized that “an appreciation of English is essential for an understanding of legislative and judicial proceedings, and of the laws of the State . . . and the nation.” But the effect of the decision is even broader. The United States Commission on Civil Rights, which recently published studies that show that the failure to teach English to Spanish-speaking children effectively excludes these children from the benefits of educational programs (*Mexican-American Education Study* (1971), at 16), has said, “Ability to communicate is essential to attain an education, to conduct affairs of state and commerce, and, generally, to exercise the rights of citizenship.” U.S. Commission on Civil Rights, *The Excluded Student* 13 (May 1972). In the political arena, petitioners, as non-English-speaking citizens, are cut off from effective participation in electoral politics. Economically, as the record discloses and respondents admit, non-Eng-

* We note that while the holding of the court below that no attention need be paid to the educational problems of particular students means that an education could be denied to blind and deaf children as long as the same books and facilities are made available to those children that are made available for other children, granting relief to petitioners would not mean that all handicapped children would likewise be entitled to relief. Under the Equal Protection Clause, the validity of any particular practice that effectively excludes children from the benefits of education would depend upon whether rational grounds exist for the practice.

lish-speaking children "frustrated by their inability to understand the regular work" are doomed to become "dropouts" and "unemployable[s] in the ghetto." (P.X. 5, 3a, 4a, 6a.)

Petitioners, respondents, and the Civil Rights Commission are not alone in attaching importance to the educational needs of non-English-speaking children. They are joined by the Congress, which has recently enacted bilingual education legislation to encourage the States to establish appropriate programs for children like the petitioners' (70 U.S.C. § 880(b)), and by the Department of Health, Education and Welfare, which recently issued guidelines providing that federally assisted school systems (like San Francisco's)¹⁰ should "take affirmative steps to rectify language deficiency" where "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district" (35 Fed. Reg. 11595; Ptn. 26a).

3. The case presents a substantial equal protection issue.

Finally, while this is not the place to discuss the merits of the case in any detail, we do think it clear that petitioners' equal protection claim is substantial.

The court below grossly mischaracterized the issue in stating that the question presented is whether petitioners are entitled to something other children do not receive

⁹ As Senator Murphy from California told his colleagues: "Senators, for a minute, imagine what it would be like if you or your youngster were to enter the first year of school where the language of instruction is different from the one you used and spoke at home. You would not only have to master a new language, but also master a subject in the new language. Would it come as a surprise if you became frustrated and fell behind, discouraged and dropped out?" Statement Before Senate Appropriations Committee, 115 Cong. Rec. S 16989 (December 17, 1969).

¹⁰ Def. Ans. to Int., Ex. B.

—something in addition to “the same facilities, textbooks, teachers and curriculum . . . provided to other children.” As we understand petitioners’ claim, it is only that since other children are being educated, they are constitutionally entitled to be educated too. To be sure, they ask to be taught English in order to profit from their classes, in which English is the sole language of instruction. But the San Francisco schools provide a variety of special programs to meet the special educational needs of particular children, such as special education for physically and mentally handicapped children. (*E.g.*, P.X. 4; Ptn. 12 n. 13.) In these circumstances, petitioners are asking for nothing more than is made available for other children as a matter of course, an educational program from which they can reasonably be expected to benefit.

It is difficult to conceive of any rational and legitimate state objective that could possibly be served by the refusal to afford petitioners the instruction they need. The state interest¹¹ suggested by the court below—far from rationally justifying San Francisco’s practices—is one that can be served only by giving petitioners the relief they seek. The court below said,

“[T]he state’s use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English

¹¹ We note that San Francisco has never claimed that expense justifies its treatment of petitioners—perhaps because there is no reason to suppose that “ESL” (English as a Second Language) classes, see note 12 *infra*, are more expensive than other kinds of classes offered by the public schools. In any event, expense would not be a legitimate excuse for an otherwise impermissible discrimination, *Shapiro v. Thompson*, 394 U.S. 613, 620 (1969), and therefore is no excuse for refusing to provide an education for some children while providing it for others.

is required to become a naturalized United States citizen, 8 U.S.C. § 1423(1); likewise, California requires knowledge of the language for jury service, Cal. Code Civ. P. § 198(2), (3). Similarly, an appreciation of English is essential for an understanding of legislative and judicial proceedings, and of the laws of the State, Cal. Const. art. IV, § 24; Cal. Code Civ. P. § 185, and the nation." (Ptn. 11a.)

Accordingly, it is the statutory "policy of the state to insure mastery of English by all pupils in the schools. . . ." Cal. Educ. Code § 71.

These are not considerations that justify the *refusal* to assist petitioners in learning English. To the contrary, these considerations suggest that petitioners *should* be given language instruction in English. While it is true that there is no unanimity among experts as to the best approach to the instruction of children in a new language,¹² there is no responsible support for San Francisco's ostrich-like approach to petitioners—simply ignoring their needs. Indeed, the San Francisco school authorities agree with everyone else on that point—as the record demonstrates. See P.X. 3, 5.

Moreover, as petitioners point out, the respondents' practices involved in this case operate only to exclude children who have a non-English-speaking national origin from the benefits of public education. The practices therefore give rise to a "suspect" classification—one that calls for strict scrutiny by this Court and one that can only be justified if it serves a compelling state interest. Clearly the classification serves no such compelling interest. In fact, for reasons stated above, the effective exclu-

¹² Two approaches are frequently used: "bilingual" programs, taught by bilingual teachers who understand the student's original language, and "ESL" programs (English as a Second Language), taught by trained teachers who speak only English. See Andersson and Boyer, *Bilingual Schooling in the United States*, vol. 1, at 12 (G.P.O., 1969).

sion of petitioners from the benefits of education serves no rational state objective of any kind. Therefore, under any test, the exclusion of these children cannot be reconciled with the requirements of equal protection.

In these circumstances, we believe the decision below was erroneous. In any event, the constitutional issue clearly is substantial. In view of the substantial nature of the constitutional question, the large number of children whose educational rights are threatened by the decision below, the impact of a denial of education on the ability of these children to participate in the political and economic life of the nation, and the importance attached to the issue by Congress, the Executive Branch, independent agencies, and respondents themselves, we respectfully submit that this case deserves review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN J. POLLAK
RALPH J. MOORE, JR.
FRANKLIN D. KRAMER
734 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Amici

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20036
*Attorney for Amicus National
Education Association*

PETER T. GALLIANO
1705 Murchison Drive
Burlingame, Calif. 94010
*Attorney for Amicus California
Teachers Association*

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

April 17, 1973

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, a Minor by and through
Mrs. Kam Wai Lau, his Guardian ad Litem, et al.,
Petitioners,

VS.

ALAN H. NICHOLS, et al.,
Respondents.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

THOMAS M. O'CONNOR,
City Attorney of the
City and County of San Francisco,

GEORGE E. KRUEGER,
Deputy City Attorney of the
City and County of San Francisco,
306 City Hall,
San Francisco, California 94102,
Telephone: (415) 556-4410,
Attorneys for Respondents.

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INTRODUCTION

We present this Brief for Respondents in opposition to the Petition for Writ of Certiorari.

We rely on Petitioners' treatment of this Court's Jurisdiction and of the opinions below, except to note that the decision of the Court of Appeals affirming the District Court's decision is now reported at 472 F.2d 909 (9th Cir. 1973).

QUESTION PRESENTED

The question stated by Petitioners assumes that which Petitioners have unsuccessfully attempted to convince two courts is so. The question stated by Petitioners is not stated in terms of the Findings of Fact in this case.

The question should more properly be stated:

Does a School District have an affirmative duty to provide special English instruction to compensate for appellants' language handicaps, whatever the origin may be of those language handicaps?

Or

Are Petitioners being denied an equal educational opportunity by the School District when the School District does not provide said Petitioners with the special instruction in English to remedy the language deficiency not caused directly or indirectly by the School District or by any State action?¹

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS INVOLVED

Petitioners now state that this case involves the First Amendment and certain HEW guidelines. To the best of Respondents' knowledge, such authority has not been cited before, either to the District Court

¹Although it is not entirely clear from the Petition, Respondents believe the Petitioners are not making in this Court an argument for "bilingual" education, as was made in the Courts below. This theory, along with the second class of Plaintiffs, has apparently been deleted from the case.

or to the Court of Appeals. This has not before been a First Amendment case.

In the District Court, Petitioners constantly referred to the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and Article IX, Section 5, of the State Constitution. The same authority was recognized by the Court of Appeals in footnote 2:

"The right to an education is claimed under the Fifth (Due Process), Ninth (Reserved Powers), and Fourteenth (Equal Protection Clause) Amendments to the Constitution of the United States; and under Article IX, Section 5 of the Constitution of the State of California (Provision for system of common schools)."

(Ptn. 3a.)

Petitioners should not now for the first time be allowed to make this a First Amendment case.

STATEMENT OF THE CASE

On March 25, 1970, Petitioners, Chinese-speaking students in the San Francisco Unified School District, filed a Complaint for Injunctive and Declaratory Relief in the United States District Court for the Northern District of California, alleging that they were being denied an equal educational opportunity because the School District failed to provide them with special, full-time instruction in English taught by bilingual teachers.

Petitioners below consisted of a first class—those who received no special instruction in English, and a second class—those who received special instruction in English, but taught by non-Chinese-speaking teachers. Petitioners now advise this Court that the Petitioners herein consist only of the first class. (Ptn. 1.)

Basically, Respondents' position in the courts below was that the Petitioners presented no substantial federal question, no constitutional challenge, nor a showing of discrimination in any form. Respondents contended that what the Petitioners sought was "special" relief for a unique problem, i.e., more than an equal educational opportunity. The special extra training sought by Petitioners was bilingual English instruction solely for Chinese students.

On May 26, 1970, the District Court issued an Order in favor of the School District. Said Order is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari, pages 22a-25a. The court found:

"This Court fully recognizes that the Chinese-speaking students involved in this action have special needs, specifically the need to have special instruction in English. To provide such special instruction would be a desirable and commendable approach to take. Yet, this Court cannot say that such an approach is legally required. On the contrary, plaintiffs herein seek relief for a special need—which they allege is necessary if their rights to an education and equal educational opportunities are to be received—that does not constitute a right which would create a duty on defendants' part to act. These Chinese-speaking students—by receiving the same education made

available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students.”

(Ptn. 24a.)

On January 8, 1973, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. Said decision is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari, pages 1a-21a. The court found:

“ . . . According to appellants, *Brown* requires schools to provide ‘equal’ opportunities to all, and equality is to be measured not only by what the school offers the child, but by the potential which the child brings to the school. If the student is disadvantaged with respect to his classmates, the school has an affirmative duty to provide him special assistance to overcome his disabilities, whatever the origin of those disabilities may be.

“Appellants’ reading of *Brown* is extreme, and one which we cannot accept.”

(Ptn. 4.)

“Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a ‘denial’ by the Board of educational opportuni-

ties within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group. Before the Board may be found to unconstitutionally deny special remedial attention to such deficiencies, there must first be found a constitutional duty to provide them."

(Ptn. 9a-10a.)

ARGUMENT

I. THE DECISIONS BELOW DO NOT SANCTION THE EXCLUSION OF LARGE NUMBERS OF CHILDREN FROM THE EDUCATIONAL PROCESS.

Respondents accept their responsibility for providing a good education for all of the 100,000+ children in the San Francisco Unified School District. The problem of teaching Chinese-speaking children to speak English has been recognized and dealt with by the School District. As stated by the District Court as a Finding of Fact:

"2. This Court recognizes that defendants have made efforts toward remedial education programs for Chinese-speaking students. . . ."

(Ptn. 23a.)

The particular problem of a School District providing special language classes for Chinese-speaking children has become acute due to the increasing number of foreign-born Chinese entering the public school system. The School District is attempting to educate this increasing student enrollment, as well as many other non-English-speaking students—Japanese, Sa-

moans, etc. Of the 100,000+ students in the School District as of September, 1969, 16,574 were Chinese. Of those, 2,856 need special English instruction. Petitioners are approximately 1,800 who received no special language instruction, although in no way can they be said to be foreclosed from receiving educational opportunities.

Respondents are employing all available means to provide an education for all students in the School District. All of the Petitioners have been enrolled in the San Francisco Unified School District, and the same courses of instruction, books, and the like are offered to all students. No contention has been made by Petitioners that the schools which Petitioners attend are in any way inferior to other schools in the School District.

What Petitioners seek is more than equal education; it is special instruction for a few students possessing a unique problem not of the State's making.

This is not a matter of unequal education, since special English instruction is not a right. Accordingly, it is not a matter of constitutional concern or guarantees.

Respondents acknowledge the language difficulties experienced by many foreign-born students, Petitioners included, but contend that the Fourteenth Amendment and the Civil Rights Act do not give a party a federal cause of action every time a School District fails to resolve a problem—not of its making—presented to it by a student.

II. THERE IS NO CONFLICT OF DECISIONS.

The Court of Appeals recognized the Petitioners' argument for what it is: a basic Fourteenth Amendment, equal protection—equal educational opportunity—argument.

“ . . . Essentially, appellants contend that appellees have abridged their rights to an education and to bilingual education, and disregarded their rights to equal educational opportunity among themselves and with English-speaking students.”

* * *

“ . . . Appellees had no duty to rectify appellants' special deficiencies as long as they provided these students with access to the same educational system made available to all other students.”

(Ptn. 3a.)

The Court of Appeals analogized to cases such as *Brown v. Board of Education of Topeka* (1954) 347 U.S. 493, and *Swann v. Charlotte-Mecklenburg Bd. of Ed.* (1971) 402 U.S. 1, and many other cases of de jure segregation. The Court of Appeals concluded:

“Although in its amicus curiae brief the Center for Law and Education, Harvard University, portrays appellants as ‘members of an identifiable racial minority which has historically been discriminated against by state action in the area of education . . . ,’ Brief at 28, appellants have alleged no such past de jure segregation. More importantly, there is no showing that appellants' lingual deficiencies are at all related to any such past discrimination. This court, therefore, rejects the argument that appellees have an affirmative duty to provide language instruction to compen-

sate for appellants' handicaps, because they are carry-overs from state-imposed segregation. See *Swann v. Board of Education*, 402 U.S. 1, 15 (1971). If there are any such remnants, that appellants' primary language is Chinese has not been shown to be one of them."

(Ptn. 8a.)

"Because we find that the language deficiency suffered by appellants was not caused directly or indirectly by any State action, we agree with the judgment of the district court and distinguish this case from *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny of de jure cases. Under the facts of this case, appellees' responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district. There is no evidence that this duty has not been discharged."

(Ptn. 11a.)

Petitioners, contending that the Ninth Circuit's interpretation of the Equal Protection Clause is wrong, again raise in this Petition the argument raised in the Court of Appeals, namely, that the Equal Protection Clause forbids identical treatment of persons not similarly situated. Petitioners cite a series of four criminal cases holding it unconstitutional for a state to condition access to the criminal system upon the payment of money. In this Petition, Petitioners add one new case, *Bullock v. Carter* (1972) 405 U.S. 134, 92 S.Ct. 849, a challenge on an election filing-fee

system. This Court held that the filing-fee system, as an absolute prerequisite to the candidate's participation in the primary election, contravened the Equal-Protection Clause. The Court of Appeals distinguished the four cases in this way: The State cannot condition access to the criminal system upon wealth, because wealth is irrelevant to guilt or innocence; however, the State can condition maximum benefits of an education upon the knowledge of English, because a knowledge of English is relevant in an English-speaking nation to the educational purposes of public schools. To carry the distinction forward to the *Bullock* case, the State cannot condition a candidate's access to the ballot upon wealth, since wealth is irrelevant to a candidate's qualification for public office. In brief, this case, in equal-protection terms, does not involve a situation of de jure discrimination. The special language deficiency of the Chinese-speaking students was not caused or brought about by the School District.

No cases have been cited by Petitioners holding that where a language deficiency was not caused directly or indirectly by State action, the Respondents' responsibility to Petitioners under the Equal-Protection Clause requires them to provide special language instruction to overcome such language deficiency. Such is not the law.

Petitioners have not demonstrated a conflict in the decisions of the lower courts on facts such as found by the District Court and affirmed by the Court of Appeals.

III. PETITIONERS' RELIANCE ON SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ IS MISPLACED.

Petitioners cite the recent Supreme Court case of *San Antonio Independent School District v. Rodriguez* (March 21, 1973) 41 L.W. 4407, as a basis for repeating their charge of:

"... since the discrimination against petitioners is based upon the 'suspect classification' of national origin, it must be subjected to the most strict judicial scrutiny."

(Ptn. 12.)

Petitioners have again failed to grasp the main current of thought running through both the District Court and Court of Appeals decisions: There has been no discrimination against Petitioners—not on the basis of national origin or on any basis.

"As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, subject only to the requirement that their classifications be rationally related to the purposes for which they are created."

(Ptn. 13a.)

Finally, although the *Rodriguez* case is of very recent origin—March 21, 1973—and, accordingly, has not been commented upon in subsequent opinions, it appears to Respondents that the scholarly majority

opinion of Mr. Justice Powell concluded that education is not a fundamental constitutional right, that unless state law seeks to restrict a constitutional right, said state law is entitled to a presumption of constitutionality, and that the test upon review is the rationality of the purpose of the state law.

"It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."

(41 L.W. 4417.)

Mr. Justice Stewart, in a brief concurring opinion, recognized that

"There is hardly a law on the books that does not affect some people differently from others . . . The Equal-Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious."

(41 L.W. 4425.)

The only classification in the instant case is the decision to use English as the language of instruction. This can hardly be considered a wholly capricious classification in an English-speaking nation.

Petitioners' reliance on the *Rodriguez* case is badly misplaced.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition be denied.

Dated, San Francisco, California,
May 1, 1973.

Respectfully submitted,

THOMAS M. O'CONNOR,
City Attorney of the
City and County of San Francisco,

GEORGE E. KRUEGER,
Deputy City Attorney of the
City and County of San Francisco,
Attorneys for Respondents.

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ON WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR
LAW AND EDUCATION, HARVARD UNIVERSITY
IN SUPPORT OF THE PETITIONERS

J. HAROLD FLANNERY
ROGER L. RICE

Center for Law and Education
Harvard University

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1972

No. 72-6520

**KINNEY KINMON LAU, A Minor by and through
MRS. KAM WAI LAU, his guardian ad Litem, et al.,
PETITIONERS,**

v.

**ALAN H. NICHOLS, et al.,
RESPONDENTS.**

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF AMICUS CURIAE OF THE CENTER FOR
LAW AND EDUCATION, HARVARD UNIVERSITY
IN SUPPORT OF THE PETITIONERS**

Introduction

We present this brief in support of the petitioners with the consent of all parties pursuant to Supreme Court

Rule 42(1). Copies of the letters of consent are attached to our covering letter to the Clerk of this Court. We rely on the petitioners' treatment of this Court's jurisdiction, the questions presented for review, constitutional and statutory provisions involved and statement of the case.

The unreported order of the district court denying petitioners' motions for injunctive and declaratory relief and finding for respondents on the merits is found at petitioners' Record on Appeal pages 418-421 (App. —). The opinion of the Court of Appeals affirming the district court's decision, District Judge Hill dissenting, is reported at 472 F.2d 909 (9th Cir. 1973). The unreported order of the Court of Appeals denying a request for *en banc* review, Judge Hufstedler dissenting and Judge Trask concurring, is found at petitioners' appendix (App. —).

Interest of Amicus Curiae

The Center for Law and Education, Harvard University, was created jointly by the Harvard Law School and the Harvard Graduate School of Education in 1969. The Center is funded by the United States Office of Economic Opportunity to work in conjunction with local legal service offices and other attorneys to promote reform in American education by working in the area of social policy and the law, especially on behalf of the poor. The Center's attorneys have concentrated on problems in the following areas: resource allocation, within and between school districts; racial discrimination; federal programs; "ability grouping"; excluded children; and bilingual education. Center personnel have participated in litigation, including the preparation of several amicus briefs; done research and writing; drafted legislation; and negotiated with public

officials. The Center publishes a bulletin entitled *Inequality in Education*.

The Center has, during the past two years, become increasingly involved in the problems of minority children who because of their linguistic and cultural background are not receiving the benefits of education. The Center's concern has led to extensive participation by Center attorneys in drafting the Massachusetts Transitional Bilingual Education Act, Massachusetts Acts and Resolves, ch. 1005 (November 4, 1971). That legislation, the first state-wide compulsory bilingual education program ever enacted, provided for a transitional training period of education in the bilingual child's native language during which period the child would learn English language skills appropriate to his or her grade level. Center attorneys have also been extensively involved in litigation concerning the educational problems of non-English speaking children with one attorney devoting full time to the educational problems of American Indian children, and the Court of Appeals opinion in this case referred to the *amicus curiae* brief filed by the Center, 472 F.2d 909, 911, 914-15, 919.

The Center's work has given us experience in evaluating the constitutionality of educational practices. In addition, the Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which is material under governing legal principles. In this brief we present educational data bearing on the educational harm which plaintiffs now suffer as the result of the defendants' educational policies as well as a discussion of cases in the education law area which bear on this action.

Our recent sampling of neighborhood legal service offices indicates that over 20 such offices are presently actively involved in litigation concerning the educational

rights of non-English speaking poor children. This demonstrates that equal educational opportunities for non-English speaking children are a matter of substantial concern to the poor. Therefore, the filing of this brief permits the Center to present an argument on a matter substantially affecting the quality of education afforded the poor.

Summary of Argument

1. The Court of Appeals found that non-English speaking Chinese children who receive no special help in learning English are nonetheless receiving equal educational opportunities at the hands of the respondents. However, Congressional studies, the vast weight of expert educational opinion and respondents themselves have concluded that if a child cannot understand the language of instruction he is doomed to educational failure. Thus, this case is markedly different from *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973) where the plaintiffs received a minimum adequate education and asserted speculative and relative deprivations. Here the petitioners do not in any real sense receive educational opportunities equal to those of their English-speaking classmates and respondents must bear the responsibility for the situation since they have failed to employ any of the several available language instruction techniques which would aid the petitioners.

2. One element of the error below was an interpretation of educational opportunity which focused on tangibles, books, facilities, teachers and ignored the essence of the educational process — the ability to communicate, to question, to comprehend and express ideas. This Court in *Brown v. Board of Education*, 347 U.S. 483, *Sweatt v. Painter*, 339 U.S. 629, and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 rejected any notion that educa-

tional opportunity could be limited to mere surface equality of facilities.

3. Even though we are a pluralistic society, discrimination against non-English speaking minority groups has long been part of our history. Thus religious and racial opprobrium has been crucial in determining whether languages other than English will be tolerated in public life. The Chinese are one such group who have been scorned, segregated and deprived of privileges on the basis of their language. Thus when a non-English speaking minority group is made to send its children to public schools which both reject the child's native language and refuse to teach him English, that group is suffering another form of language-based ethnic discrimination and that discrimination becomes "part of the educational message to be communicated." *Norwood v. Harrison*, 41 U.S. Law Wk. 5094, 5098 (June 25, 1973) and such a message of rejection itself has the effect of lowering the minority child's chances of success.

4. This Court in the recent voting rights case of *White v. Regester*, 41 U.S. Law Wk. 4885, 4889 (June 18, 1973) recognized the linguistic impediments to educational success which may be suffered by a minority group. Lower Federal courts have likewise granted relief to claims of denials of equal educational opportunities which were presented by linguistically excluded students. And while the intent to discriminate need not be shown when there is a discriminatory impact, respondents here have intentionally allocated resources and set priorities which deny petitioners the kinds of programs which respondents know are vital to petitioners.

5. The petitioners are members of a class marked by the "traditional indicia of suspectness", *Rodriguez, supra* at 1294 and hence in view of this Court's long history of strict scrutiny of classifications which burdened the Chi-

nese, the Court below should have applied the more rigorous standard of equal protection review. However, a system which withholds knowledge of English from those who need it most can not be justified as rationally related to any state objective articulated in this case. Thus, San Francisco rewards those who come from English-speaking homes while effectively excluding those who do not. No legitimate governmental objective is served by such a system which under any standard of review is arbitrary, invidious and a violation of the Fourteenth Amendment's Equal Protection Clause.

6. The Court below applied the wrong standard of review to petitioners' equal protection claim, *Rodriguez*, *supra* and misallocated the burden of proof in the face of a history of ethnic group discrimination, *Keyes v. School District No. 1, Denver, Colorado*, 41 U.S. Law Wk. 5002, 5008 (June 21, 1973). Yet a remand in light of those decisions would be improper a) because *Rodriguez* was considered and found inapplicable by a majority of the Court of Appeals on request for *en banc* review, b) because *Keyes* does not address the language issue directly and c) because of the need for swift relief. Therefore this Court should declare denial of language instruction a denial of equal educational opportunities to petitioners and remand to the district court for receipt of a plan from respondents whereby these denials will be corrected.

Argument

I. THE RESPONDENTS HAVE DENIED PETITIONERS THE EQUAL PROTECTION OF THE LAWS BY EFFECTIVELY EXCLUDING THEM FROM ACCESS TO AN EDUCATION.

A. Petitioners Do Not Receive Educational Opportunities Equal To Those Received By Children From English-Speaking Homes.

This case presents a challenge by 1800 Chinese-speaking pupils in the San Francisco public schools to a system of education which compels them to attend schools conducted in the English language but offers them no assistance in learning the language of instruction. As a result of the respondents' refusal to provide these Chinese pupils special instruction in English they suffer a very real exclusion from the educational process albeit their attendance in the classroom is compelled. Thus, while English-speaking students raise their hands and ask questions, the petitioners sit silent. And while both petitioners and their English-speaking classmates are given the same books, for the Chinese-speaking children the pages are as if blank; the print conveys nothing. For petitioners schooling consists neither of intelligible instruction nor communication with classmates, and education becomes "mere physical presence as audience to a strange play which they do not understand." *Lau v. Nichols*, 472 F.2d 909, 919 (9th Cir. 1973) (Hill, J. dissenting).

Thus at the outset it is well to note an important distinction between the obvious and overwhelming educational deprivations suffered by the petitioners and the harms envisaged by the plaintiffs in *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973) (hereinafter cited as *Rodriguez*). That case concerned the constitutional adequacy of the Texas school finance system. The system, known as a Minimum Foundation Program, was asserted by the state to provide "at least an adequate program of education" . . . for "every child in every school district" *Rodriguez*, *supra* at 1292. Faced with a claim that the method of disbursing tax revenue somehow discriminated against poor school districts to the detriment of the education offered to children in those districts, the Court noted the relative nature of

the harm alleged and could find no proof that the Texas program did not in fact provide a minimally adequate education for all students. *Supra* at 1292, 1299.

In this case, however, petitioners assert that they in no sense receive a minimally adequate education. Indeed, they assert that, being unable to communicate or understand the language of instruction, their educational opportunities are wholly unequal to those of English-speaking children.

That children from non-English speaking language minority groups suffer grave deprivations of educational opportunity is a national tragedy of great proportion.¹

Recently the United States Senate Select Committee on Equal Educational Opportunity completed three years of investigation into the way American public education serves minority group children. In its final report the Committee stated: "It is the conclusion of this committee that some of the most dramatic, wholesale failures of our public school systems occur among members of language minorities . . . [w]hat these conditions add up to is a conscious or unconscious policy of linguistic and cultural

¹ The U. S. Department of Health, Education and Welfare has estimated that there may be five (5) million public school children in the country who speak a language other than English in their homes. U. S. Department of Health, Education and Welfare, "Draft: Five Year Plan, 1972-77: Bilingual Education Program" (August 24, 1971). Among those directly affected by the decision below are many of the approximately 740,000 Spanish surnamed students in Arizona, California, Idaho, Montana, Nevada, Oregon and Washington — or 37% of the total number of Spanish surnamed students in the United States. United States Commission on Civil Rights, *Mexican American Education Study* (April, 1971) p. 16. Also affected will be many of the 64,000 American Indian children in those states — approximately 33% of the total number of Indian students nationally. Report of the Committee on Labor and Public Welfare and Committee on Interior and Insular Affairs, S. Rep. No. 92-384, 92nd 1st Sess. (1971), at 23-24.

exclusion and alienation."² The Committee found that twenty-three percent of the total school enrollment in New York City is made up of Puerto Rican children. Yet in 1963 only 331 of 21,000 (1.6%) "academic" diplomas granted in New York went to such children.³ In other cities the picture is no brighter. In Newark, for example, there were 7,800 Puerto Rican students in the public school system but only 96 survived to the twelfth grade while in Chicago the dropout rate among Puerto Rican students approached sixty percent.⁴ Among Mexican-Americans the language barrier poses equally severe educational difficulties. Some fifty percent of this group never go past the eighth grade. In Texas, for instance, forty percent of the Spanish-speaking citizens are described as "functional illiterates."⁵ Among Cherokee Indians the school dropout rate runs to seventy-five percent with illiteracy among adults at forty percent.⁶

The Senate Committee's findings of "linguistic and cultural exclusion and alienation" are amply supported by the weight of expert educational opinion and, indeed, by respondents themselves.⁷ Thus the evidence indicates that

² Report of the Select Committee on Equal Education Opportunity, S. Rep. No. 92-000, 92nd Cong., 2nd Sess. (1972), at 277.

³ Hearings Before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2nd Sess., pt. 8, at 3726 (1970).

⁴ *Id.* at 3685.

⁵ *Id.* at Part 4, 2400.

⁶ Report of the Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, S. Rep. No. 501, 91st Cong., 1st Sess. (1969), at 19.

⁷ [When these [non-English-speaking Chinese] youngsters are placed in grade levels according to their age and are expected to compete with their English-speaking peers, they are frustrated by their inability to understand the regular classwork For [these] children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto. San Francisco Unified School District, *Pilot Program: Chinese Bilingual*, pages 3A-6A (May 15, 1969), Plaintiffs' Exhibit No. 5 —, (App. —).

verbal forms of communication in children evolve more slowly than actual understanding. The natural process is for a child first to develop understanding and then to form a concept. Then, when the child has formed the new category, he needs a name or label for it, and as he becomes older the child begins to use language at an accelerating rate for purposes of problem solving.* When ideas are being formed in one language, it is difficult to state them in another and "cognitive confusion," confusion in the child's understanding of the concepts and reasoning tasks at hand may develop. This confusion may lead to great frustration or anxiety and ultimately to a loss of interest in expressing ideas. When a school instructs in a second language before a child has developed adequate cognitive skills in his native language, the child may become a "non-lingual" whose functioning in both his native and a second language develops in only limited

* See Vera P. John and Vivian M. Horner, *Early Childhood Bilingual Education* (Modern Language Association of America, 1971), 171; Joan T. Feely, "Teaching Non-English Speaking First Graders to Read," *Elementary English* (1970), 207; Anne Anastasi and Fernando A. Cordova, "Some Effects of Bilingualism Upon the Intelligence Test Performance of Puerto Rican Children in New York City," *The Journal of Educational Psychology*, Vol. XLIV (1953), 15, 16; Sheldon H. White, "Some General Outlines of the Matrix of Developmental Changes Between Five and Seven Years," *Bulletin of the Orton Society* (1970), 20, 41-57; John MacNamara, "Effects of Instruction in a Weaker Language," *The Journal of Social Issues*, Vol. XXIII (1967), 22, 132; Sheldon H. White, "Evidence for a Hierarchical Arrangement of Learning Processes," in L. P. Lipsett and C. C. Spiker, eds., *Advances in Child Development and Behavior*, Vol. II (New York: Academic Press, 1965); John MacNamara, "Cognitive Basis of Language Learning in Infants," *Psychological Review*, Vol. 79 (1972), 1; John A. Downing, "Children's Thoughts and Language in Learning to Read," Unpublished paper, ERIC, (1971); and generally Jean Piaget, *The Language and Thought of the Child* (London: Routledge and Kegan Paul, 1959) and Leo S. Vygotsky, *Thought and Language* (Cambridge: M.I.T. Press, 1962).

ways.* Moreover, the educational harms suffered by the non-English speaking child are not limited to his verbal abilities or comprehension of orally presented subject mat-

* See John and Horner at 165-73; Feely at 207; Anastasi and Cordova at 3; C. Allen Tucker, "The Chinese Immigrant's Language Handicap: Its Extent and Its Effects," *Florida FL Reporter*, Vol. 7 (1969) 44; Miles V. Zintz, *Education Across Cultures* (Kendall Hunt, 1969), 142-3, 262, 267, 398; Northeast Conference on the Teaching of Foreign Languages, *The Challenge of Bilingualism*, Report of Working Committee II, in G. Reginald Bishop, Jr., ed., *Foreign Language Teaching: Challenges to the Profession* (1965) 77-8; Madorah F. Smith, "Measurement of Vocabularies of Young Bilingual Children in Both of the Languages Used," *The Journal of Genetic Psychology*, Vol. 74 (1949), 305-10; Ethel M. Barke and D. E. Williams, "A Further Study of the Comparative Intelligence of Children in Certain Bilingual and Monolingual Schools in South Wales," *The British Journal of Educational Psychology*, Vol. VIII (1938), 63; Theodore Andersson, "A New Focus on the Bilingual Child," *The Modern Language Journal*, Vol. XLIX (1965), 156-60; Chester C. Christian, Jr., "The Acculturation of the Bilingual Child," *The Modern Language Journal*, Vol. XLIX (1965), 163-64; David T. Hakes, "Psychological Aspects of Bilingualism," *The Modern Language Journal*, Vol. XLIX (1965) 220-27; Mildred V. Boyer, "Poverty and the Mother Tongue," *Educational Forum*, Vol. XXIX (1965), 290-96; George Perren, "New Languages and Younger Children," *English Language Teaching*, Vol. XXVI (1972), 229-238; Doris C. Ching, "Methods for the Bilingual Child," *Elementary English*, Vol. 42 (1965) 22-27; Patricia G. Adkins, "Deficiency in Comprehension in Non-Native Speakers," *TESOL Quarterly*, Vol. 3 (1969) 197. The broad conclusion that frustration and anxiety resulting from the language problem may in turn produce academic failure is in line with the finding that fear of academic failure in fact induces failure. See Eugene Burnstein, "Fear of Failure, Achievement Motivation, and Aspiring to Prestigious Occupations," *Journal of Abnormal Psychology and Social Psychology*, Vol. 67 (1963) 189-193; Emery L. Cowen, Melvin Zax, Robert Klein, Louis D. Izzo and Mary Ann Trost, "The Relation of Anxiety in School Children to School Record, Achievement, and Behavioral Measures," *Child Development*, Vol. 36 (1965) 685-695; N. T. Feather, "The Relationship of Expectation of Success to Reported Probability, Task Structure, and Achievement Related Motivation," *Journal of Abnormal Psychology and Social Psychology*, Vol. 66 (1963) 231-238; R. S. Lazarus, J. Deese and Sonia F. Oler, "The Effects of Psychological Stress Upon Performance," *Psychological Bulletin*, Vol. 49 (1952) 293-317.

ter. Research indicates that development of reading skills will also be impaired when there is a mismatch between the literary learner's own spoken and written language and the spoken language that the teacher regards as the proper basis for the learner's expected literate responses.¹⁰

These educational experts have focused on several different methods of teaching non-English speaking youngsters.¹¹ Yet it is significant that no support could be found in the literature for simply allowing non-English speaking youngsters to sit, uncomprehending, in the classroom without making intensive efforts to minimize their language disabilities.¹² The reference in the opinion below to a dispute among the experts¹³ cannot obscure the fact that petitioners are receiving no language instruction at this point, either by English as a Second Language, by bilingual education or by any other instructional method.

Moreover, the educational deprivations which any non-English speaking child suffers upon being thrust unaided into an English-only classroom are felt even more strongly when the child's home language is wholly unlike English. Among the characteristics of the Chinese language which make it remarkably dissimilar from English are the following: a) Chinese is a tone language, i.e., meaning depends largely upon pitch or tone; b) vowels occur in very strictly controlled consonant environments; c) there are

¹⁰ John Downing, *Comparative Reading* (MacMillan Company, 1973) 181 ff; Nancy Modiano, "National or Mother Language in Beginning Reading: A Comparative Study," *Research in the Teaching of English*, 2 (1968) 32-43.

¹¹ John B. Lum, "An Effectiveness Study of English as a Second Language (ESL) and Chinese Bilingual Methods," Unpublished paper, ERIC (1973).

¹² Indeed such efforts are crucial. See A. V. Overn and D. G. Stubbins "Scholastic Difficulties of the Children of Immigrants," *Journal of Educational Research*, Vol. 31 (1937) 278-280.

¹³ *Law v. Nichols*, *supra* at 917, fn. 17.

very few words or syllables that end with a consonant; d) there are no consonant clusters; e) there are no singular/plural distinctions for nouns in Chinese; f) Chinese verbs have only one form; g) word order cannot be manipulated for meaning change as English word order can; h) the written language is pictorial rather than phonic as in English.¹⁴

Finally, references to the "exploratory nature" of respondents' current efforts, *Lau v. Nichols*, *supra* at 918, should not lead this Court to conclude that there is anything novel or experimental in the educational proposition that non-English speaking children will do poorly in an English-language school unless given language instruction. Over sixty years ago a massive Congressional study on immigrant education reported that 82% of the Chinese-speaking students in the San Francisco public schools were educationally retarded.¹⁵ At present there are nearly

¹⁴ See C. Allen Tucker, "The Chinese Immigrant's Language Handicap: Its Extent and Its Effects," *Florida FL Reporter*, Vol. 7 (1969) 44-45; An-Yan Tang Wang and Richard A. Earle, "Cultural Constraints in Teaching Chinese Students to Read English," *The Reading Teacher*, Vol. XXV (1972) 663-669; George S. C. Cheong, "Does English Overtax Our Human Energy," *Elementary English*, Vol. XLVII (1971) 56-58; Charles C. Fries and Yao Shen, *An Intensive Course in English for Chinese Students* (University of Michigan, 1946); Herbert Allen Giles, *China and the Chinese* (Columbia University Press, 1902) 3-36.

¹⁵ Report of the Immigration Commission, Document Number 749, 61st Cong., 3d Sess. (1911) at Vol. V, 294. During this period the Constitution of New Mexico provided that: "The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils . . . and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students." Constitution of the State of New Mexico, Art. XII, section 8 (1912). Even earlier Colorado (1867), Louisiana (1879), Ohio (1840) and Michigan (1837) facilitated the non-English speaking child in his efforts to acquire comprehensible public education, see gen-

400 bilingual educational programs operating in 36 states, the District of Columbia, Guam, Puerto Rico, and the trust territories. These programs cover 32 languages and are funded by Federal, State, local and private sources.¹⁶ Thus there is nothing novel about the type of denial of educational opportunity of which petitioners complain. Nor are respondents lacking in possible models to turn to were they of a mind to do so. Rather, respondents have taken the position that they have no responsibility to do anything to assist petitioners since petitioners' plight is, in the words of the opinion below, "... the result of deficiencies created by the appellants themselves in failing to learn the English language." *Lau v. Nichols*, *supra* at 917. We now turn to an examination of that responsibility.

B. *The Respondents Are Responsible For The Lack Of Equal Educational Opportunity Being Suffered By The Petitioners.*

1. The Decision Below Improperly Constricts This Court's Rulings in *Sweatt v. Painter*, 339 U.S. 629 (1950), *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) and *Brown v. Board of Education*, 347 U.S. 483 (1954).

erally Heinz Kloss, *Das Volksgruppenrecht in den Vereinigten Staaten von Amerika*, Vol. I and II (Essen, 1940, 1942) 165, 369, 451, 527 and Table of English Excerpts 976-997 and Joshua A. Fishman, *Language Loyalty in the United States* (Mouton, 1966).

¹⁶ Maria E. Brisk, *Directory of Bilingual Education Programs*, 1972-3, (Center for Applied Linguistics, 1973) (forthcoming). Among the many techniques in use are those developed in programs described in the U. S. Department of Health, Education and Welfare, *PREP Report No. 31, Early Childhood Programs for Non-English Speaking Children* (1972); U. S. Department of Health, Education and Welfare, *Model Programs — Compensatory Education Series* (1972); U. S. Department of Health, Education and Welfare, *Profiles in Quality Education* (1968).

In its discussion of *Brown v. Board of Education*, 347 U.S. 483 (1954) the Court below has attributed to *Brown* a meaning so narrow as to gut that case of its logical essence. For the majority of the Court of Appeals panel, *Brown* meant only that state-enforced segregation was no longer to be allowed and hence in this case that "... the Equal Protection Clause extends no further than to provide [children who speak no English] ... the same facilities, textbooks, teachers and curriculum as is provided to other children in the district." *Lau v. Nichols*, 472 F.2d 909, 916 (9th Cir. 1973).

Certainly one important basis for *Brown* was that compulsory racial separation is *per se* discriminatory against black people. This is so because "[s]egregation in public education is not reasonably related to any proper governmental objective . . ." ¹⁷ and thus imposes an arbitrary and invidious classification upon those subject to the segregation.

We believe, however, that the concept of equal educational opportunity as it has been developed in the decisions of this Court must also embrace any avoidable regimen of compulsory public education which by its nature denies to an identifiable ethnic minority group the same chances for classroom success as is afforded the majority of its students. To reach any other conclusion would be to ignore the very rationale which this Court used in reaching its decision in *Brown*.

In *Brown* the Court was faced with racial segregation of students in a setting in which "... the Negro and white schools involved have been equalized . . . with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Supra* at 492. Refusing to limit its inquiry to such "tangibles" the Court began its analysis with a discussion of earlier cases in which

¹⁷ *Bolling v. Sharpe*, 347 U.S. 498, 500 (1954).

black graduate students had been denied equal educational opportunities. The Court said:

In *Sweatt v. Painter*, *supra* [339 U.S. 629, 70 S. Ct. 850], in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, *supra* [339 U.S. 637, 70 S. Ct. 853], the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

The Court continued, "[s]uch considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Supra* at 493. Thus the Court made it clear that any analysis of equal educational opportunity would look behind mere surface equality of facilities to the crucial, often intangible factors which go to make up the educational experience. When one racial group was systematically deprived of opportunities to enjoy such intangible factors the existence of some other equality of facilities was irrelevant. In *McLaurin v. Oklahoma State Regents*, *supra* the fact that the petitioner "uses the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned

in these rooms have any disadvantage of location" did not deter the Court from finding an Equal Protection denial in restrictions which impaired the petitioner's ability to study and engage in discussions. Here the mere surface equality of "facilities, textbooks, teachers and curriculum" cannot foreclose this Court from looking at the functional exclusion of these non-English speaking children and the absolute impairment of their ability to participate in their classroom society. Indeed, in many ways the deprivation of educational opportunity suffered by these petitioners is so severe that one could argue that *Sweatt* and *McLaurin* standing alone compel reversal of the Court below. In any event it is difficult to understand how one can read the reliance on those earlier cases in *Brown* and still apply an Equal Protection analysis which ignores the reality of inequality which the school system itself has recognized.¹⁸

¹⁸ Although the opinion below is the first instance we are aware of in which a lower Federal court has ignored the *Brown* findings of actual denial of equal educational opportunity, attempts to limit *Brown* are not unknown. In *U. S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (1967), *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840 (1967), the Court was faced with a construction of *Brown* which focused only on the harmful consequences of segregation. In making clear that segregation was *per se* prohibited by the Equal Protection clause the Court stated that: "The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision." *supra* at 871. Here the Court below has implicitly concluded that the finding of harmful consequences constituted no part of the basis for the *Brown* decision. Such a result would render meaningless the concept of equal educational opportunity for non-English speaking minority group children. And as the Court in *United States v. Jefferson County Board of Education*, *supra* refused to interpret *Brown* narrowly to the detriment of black children, this Court must not acquiesce in an even more cramped view of *Brown* as it affects other minority children.

2. *Deprivation of Language Instruction Is a Form of Ethnic Discrimination.*

In Part A we presented educational data which showed that non-English speaking children are without educational opportunities equal to those of their English-speaking classmates. While this may be said to be educationally true for any non-English speaking child, the inequality described reaches constitutionally prohibited dimensions when the linguistically excluded pupils belong to a minority group and the language of instruction thus withheld from them is that of the majority. Such a situation is underscored when the very group involved has suffered past language-based educational discrimination. For the historical record does not live up to Mr. Justice Powell's admonition that, "[I]n a pluralistic society such as ours it is essential that no racial minority feel demeaned or discriminated against" *Keyes v. School District No. 1, Denver, Colorado*, 41 U.S. Law Wk. 5002, 5017 (June 21, 1973) (Powell, J. concurring in part and dissenting in part).

Indeed, one writer has concluded that analysis of the record indicates that official acceptance or rejection of bilingualism in American schools is dependent upon whether the group involved is considered politically and socially acceptable If the group is in some way (usually because of race, color, or religion) viewed as irreconcilably alien to the prevailing concept of American culture, the United States has imposed harsh restrictions on its language practices; if not so viewed, study in the native language has gone largely unquestioned, or even encouraged.¹⁹

¹⁹ Arnold Liebowitz, *Educational Policy and Political Acceptance* (Center for Applied Linguistics, 1971).

Thus, for instance, while German teaching in the public schools flourished prior to the 1880's, nationalist reactions to rising immigration in the latter part of the 19th century led directly to efforts to ban the German language from the public schools. And with the anti-German feelings rampant during the First World War these efforts were vigorously and successfully renewed, leading ultimately to the pronouncement of this Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923).²⁰ The political irony of barring the German language is especially sharp when we consider that the Continental Congress printed German editions of the Articles of Confederation at its own expense.²¹

Similar patterns of discrimination on the basis of language have occurred for Mexican-Americans in the Southwest and the Japanese, although perhaps no languages were as vigorously attacked as those of the American Indians.²²

Of course, the petitioners here do not seek to question the use of English as the medium of instruction. But we think it clear that when a non-English speaking minority group is required to send its children to public schools which both exclude that group's native language and refuse to teach English to the non-comprehending minority children, that group is suffering a form of language-based discrimination.

In discussing another form of discrimination Chief Justice Burger has recently observed that: "[T]here is no reason to discriminate against students for reasons wholly

²⁰ *Ibid.* at 18-19.

²¹ Heinz Kloss, *Excerpts from the National Minority Laws of the United States of America* (East-West Center, 1966), 32.

²² The Congressionally appointed Indian Peace Commission reported in 1868 that: "... in the difference of language today lies two-thirds of our trouble. Schools should be established which children should be required to attend; their barbarous dialects would be blotted out and the English language substituted." Quoted in Liebowitz at 67.

unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated." *Norwood v. Harrison*, 41 U.S. Law Wk. 5094, 5098 (June 25, 1973). Here, respondents' failure to allocate its attention and resources to the problem of 1800 non-comprehending Chinese-speaking students communicates a powerful message of educational discrimination. To the Chinese-speaking student the message is one of official neglect and rejection, of expected relegation to second-class education and non-participation in the life of the classroom.²³ And unfortunately that official neglect and rejection cannot help but shape the attitudes of the English-speaking children to their Chinese classmates.²⁴

²³ One writer has said of language minority groups, "[B]ecause their language is not considered valid in the larger society, they are made to feel that they are not personally adequate." Einar Haugen, "The Curse of Babel," *Daedalus*, Vol. 102 (1973). It seems to be the case that when a school has a low expectation of a child's success, the child will tend to do poorly. David Hughes, "An Experimental Investigation of the Effects of Pupil Responding and Teacher Reacting on Pupil Achievement," *American Educational Research Journal*, Vol. 10 (1973) 21-37; C. F. Palfrey, "Head Teachers' Expectations and their Pupils' Self-Concepts," *Educational Research*, Vol. 15 (1973) 123-127; W. W. Purkey, *Self-Concept and School Achievement* (Prentice-Hall, 1970). Compare Audrey James Schwartz, "A Comparative Study of Values and Achievement: Mexican-American and Anglo Youth," *Sociology of Education*, Vol. 44 (1971) 438-462.

²⁴ Moreover, the Chinese have long been "subjected to [such] a history of purposeful unequal treatment," *Rodriguez, supra* at 4415, treatment which burdened them in schools as well as business and which often focused on their language as the crucial aspect of their ethnicity enabling discriminatory burdens to be imposed.

"Historically, California provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved in *Brown v. Board of Education* . . ." *Lee v. Johnson*, 92 S. Ct. 14, 15 (1971) (Per Douglas, J. as Circuit Judge on application for stay). Thus, until repealed in 1947 (1947 Cal. Stats. c. 737 Section 1) the California Education Code provided for the racial separation of Chinese school children. As the California Supreme Court recently noted in *Castro v. State*, 85 Cal. Rptr. 20, 466 P.2d 244 (1970) fn. 11,

3. Recent Cases Have Recognized the Effect of Language-Based Discrimination.

The Constitutional implications of the kind of minority group language discrimination complained of have been recognized in recent cases. In *White v. Regester*, 41 U.S. Law Wk. 4885, 4889 (June 18, 1973), this Court upheld unanimously that part of the District Court's order which invalidated a multimember district plan because of its discriminatory impact upon Mexican-Americans. Mr. Justice White cited the finding of the District Court that

prejudice against the Chinese in California has at times been rampant. In *People v. Hall*, 4 Cal. 399, 404-405 (1854) Chief Justice Murray described plaintiffs' race as follows:

... a distinct people whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference...

Not only were the Chinese the object of legislative and judicial scorn, but early on, their language was seized upon by those who would impose disabilities upon them. For instance, the California Constitution of 1879 excluded Chinese immigrants from voting. When it later appeared that the children of the original Chinese immigrants might qualify as voters, the legislature passed an English-only literacy test as a voting requirement. See *Castro v. State*, *supra* at fn. 11.

And at the same time as statutes provided for the segregation of Chinese students in schools, other statutes provided for the segregation of their language. Indeed until the current version of the California Education Code Section 71 was enacted in 1967 the teaching by languages other than English was prohibited. See, e.g., 1943 California Education Code Section 8251: "All schools shall be taught in the English language." See generally Harold R. Isaacs, *Scratches on Our Minds* (John Day, 1958) for a description of American attitudes toward the Chinese. For a history of the segregation of the Chinese in the California public schools see Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850-1970* (Harvard University Press, 1971), Charles C. Dobie, *San Francisco's Chinatown* (D. Appleton-Century Co., 1936), and Charles Wollenberg, *Ethnic Conflict in California History* (Tannon-Brown, 1970).

Mexican-Americans "are reared in a subculture in which a dialect of Spanish is the primary language, providing permanent impediments to their educational and vocational advancement" *Supra* at 4884 fn. 13. The District Court had also observed that while no racial or other group has a constitutional right to be successful in its political activities, "... a state may not design a system that deprives such groups of a reasonable chance to be successful." *Graves v. Barnes*, 343 F. Supp. 704, 734 (W. D. Tex. 1972). The petitioners, here, are faced with similar language impediments and likewise assert that for them equal educational opportunity means that the respondents may not continue to operate a system which clearly deprives them of any reasonable chance to be successful in their educational pursuits.²³

In *Serna v. Portales Municipal School Board*, 351 F. Supp. 1279 (D.N. Mex. 1972) and *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972) the courts found that bilingual language pro-

²³ That San Francisco intentionally operates such a system is clear. In setting priorities and allocating resources respondents have failed to provide the language instruction which petitioners seek. The result has been the educationally impossible situation with which the petitioners are confronted. Respondents clearly acknowledge the result, see fn. 7, *supra* and Brief for Respondents In Opposition To Petition For Writ of Certiorari at 7, but insist that they have no obligation to design a system of education which would ameliorate the harmful effects of the system which they themselves have designed and currently operate. "When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission." *Davis v. School District of City of Pontiac*, 309 F. Supp. 734, 741 (E. D. Mich., 1970), *affirmed*, 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971). Mr. Justice Stewart has stated that a state's actions in this context will be judged by its "purpose or effect." *San Antonio Independent School District v. Rodriguez*, 41 U.S. Law Wk. 4407, 4425 (1973). (Concurring opinion of Mr. Justice Stewart) (emphasis added).

grams were necessary to overcome the educational deprivations of Spanish-speaking Mexican-American youngsters. And in *Guadalupe Organization v. Tempe Elementary School District No. 8*, Civ. No. 71-435 Phx. (D. Ariz. 1972) and *Diana v. State Board of Education*, Civil Action No. C-1037 RFP (N.D. Cal. 1970) the courts adopted as orders agreements reached to alleviate the discriminatory practice of assigning Spanish-speaking students to classes for the mentally retarded on the basis of examinations conducted in English.

II. RESPONDENTS' REFUSAL TO PROVIDE LANGUAGE INSTRUCTION TO CHINESE-SPEAKING STUDENTS IS ARBITRARY AND INVIDIOUS DISCRIMINATION PROHIBITED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The petitioners have urged this Court that they are members of a class marked by the "traditional indicia of suspectness"²⁶ and hence that special scrutiny should be used in analyzing their treatment by the school district. We agree with that proposition. For nearly one hundred years this Court has shown a willingness to scrutinize closely laws which impinged on Chinese immigrants and citizens. *Yick Wo v. Hopkins*, 118 U.S. 336 (1886), including laws which operated on the basis of language. For instance, in *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), a Philippines ordinance required the keeping of business account books in English, Spanish, or a local dialect. Despite the obvious usefulness of the ordinance in assisting local tax collection and auditing, the Court focused on the discriminatory impact which the ordinance had on Chinese merchants, an impact which was found to deny them Equal Protection of the laws. At this late date

²⁶ *Rodriguez, supra* at 1294.

there can be little room to doubt that classifications which discriminate against the Chinese are inherently suspect.

However, even under the less exacting "rational purpose" test respondents' treatment of the petitioners fails to pass constitutional muster. As this test has been recently expressed, the question is whether the difference in treatment "bears a rational relationship to a state objective that is sought to be advanced" *Reed v. Reed*, 404 U.S. 71 (1971); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *James v. Strange*, 407 U.S. 128 (1972). Certainly the deprivation here bears no rational relationship to "the educational and socializing purposes for which public schools were established." *Law v. Nichols*, *supra* at 916. For it is not the use of English as the language of instruction which discriminates against petitioners but rather respondents' refusal to provide language instruction to teach them English.

Respondents' course of action makes sense only if their purpose is to limit the teaching of English and other subjects to those students who come from English-speaking homes. If that is their purpose, a purpose akin to rewarding pupils fortunate enough to have English-speaking parents, then refusing petitioners the instruction which would enable them to master English is understandable. However, not only must the state's actions be rationally related to its purpose but, even more fundamentally, that purpose must be a permissible one. *Weber v. Aetna Casualty & Surety Company*, *supra*, *Rodriguez*, *supra* at 1302; see also *United States Department of Agriculture v. Moreno*, 41 U.S. Law Wk. 5105 (June 25, 1973). To discriminate so grossly in favor of the English-speaking children could hardly be a legitimate state purpose.

The only other "justifications" which the Court below

may have found are those of limited resources and the exploratory nature of the respondents' language instruction program. As for the latter, we have already discussed the uncontroverted fact that the 1800 non-English speaking Chinese students in petitioners' class are receiving no special instruction by any of the methods of language instruction which are possible. And respondents have never denied the consequences of that non-program.²⁷ And as for the limited nature of the district's financial resources, that cannot be a justification for granting comprehensible education to one ethnic group while denying it to another.²⁸

Finally, the respondents may be arguing that they treat all students exactly alike by intentionally ignoring the petitioners' inability to speak English. However, the application of a single "equal" standard to "unequal" individuals makes sense only insofar as the basis for applying the standard is a common characteristic of those individuals rationally related to the state's objective. Here mere physical ability to sit in a classroom seat together with English-speaking pupils is used as the basis for forcing petitioners to submit to teaching which they cannot possibly understand. Unless the purpose of education is somehow reduced to detaining petitioners for a certain number of hours each day in a classroom, the application to them of teaching geared to children who already speak English is irrational, arbitrary and invidious classification.

²⁷ See, e.g., fn. 7.

²⁸ "The State must provide . . . it as soon as it does for applicants of any other group." *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631, 632 (1948); ". . . all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class . . ." *Cumming v. County Board of Education*, 175 U.S. 528 (1899).

Conclusion

At the time this case was before the Court of Appeals, this Court had not yet reached its decisions in *Rodriguez, supra* and *Keyes, supra*. The Court below appears to have used the wrong standard for Equal Protection review in a case involving a traditionally suspect class, *Rodriguez, supra* at 1294. Furthermore, the Court in *Lau v. Nichols, supra* at 914 appears to have improperly allocated the burden of proof in cases involving historical ethnic group discrimination, *Keyes, supra* at 5008.²⁹ Thus it would appear that it is San Francisco's burden to prove that it is not discriminating against Chinese-speaking students when it withholds from them the language instruction which it knows is necessary for those students' full participation in classroom life.

However, we would urge that a remand to the Court below for consideration of *Keyes* and *Rodriguez* would be inappropriate at this time. We take this position for three reasons. First, although *Rodriguez* was not decided at the time of the panel decision, *Rodriguez* was in fact considered by the full Court of Appeals on the request of a member of that court for a reconsideration of the case *en banc*. *Lau v. Nichols* (9th Cir. June 18, 1973) (request for *en banc* review). A majority of the Court of Appeals rejected that request and apparently felt that "little comfort for the dissent may be found in *San Antonio Independent School District v. Rodriguez*" (Trask, J. and Wright, J. specially concurring in the rejection of *en banc* consideration).

²⁹ "In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions We reject any suggestion that remoteness in time has any relevance to the issue of intent." *Keyes v. School District No. 1, Denver, Colorado, supra* at 5008.

Second, the decision in *Keyes* does not address itself to the issue of language-based ethnic discrimination involved herein. Thus, although the Court below did refer to this Court's impending decision in *Keyes*,³⁰ there is nothing in *Keyes* directly addressing the *Lau* court's contention that: "appellees' responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district The classification claimed invidious is not the result of laws enacted by the State . . . but the result of deficiencies created by the appellants themselves in failing to learn the English language." *Supra* at 916-917.

Third, the complaint in this case was filed in March of 1970. By the time this Court hears the case we will be well into the 1973-74 school year. The need for promptly remedying denials of equal educational opportunity is manifest and need not be stressed to this Court.

Thus, we believe that this Court should give clear guidance to respondents and the Courts below on the question of language-based denials of equal educational opportunity.

We submit that this Court should:

(1) declare that the refusal of San Francisco to provide language instruction to its Chinese-speaking pupils so as to enable petitioners to participate in the educational process contravenes the Equal Protection Clause of the Fourteenth Amendment.

(2) remand the case to the district court for consideration, on an expedited basis, of a plan to be presented by the respondents which would outline the nature of respondents' intended efforts to alleviate the handicap which respondents have placed on petitioners by using English as the sole medium of instruction while refusing to pro-

³⁰ *Lau v. Nichols*, *supra* at 913, fn. 8.

vide instruction which would enable petitioners to understand English.

Respectfully submitted,

J. HAROLD FLANNERY

ROGER L. RICE

Center for Law and Education

Harvard University

July, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMAN LAU, et al.,
Petitioners,

vs.

ALAN H. NICHOLS, et al.,
Respondents.

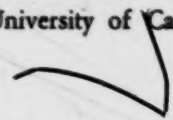
On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**Brief Amicus Curiae of
the Childhood and Government Project
in Support of Petitioner Children**

We present this brief in support of petitioner children with the consent of the parties pursuant to Supreme Court Rule 42. Copies of letters of consent are filed herewith.

INTEREST OF AMICUS CURIAE AND STATEMENT OF THE CASE

The Childhood and Government Project of the Earl Warren
Legal Institute, The School of Law, University of California,



Berkeley, California, was established in 1972. Its concern is with governmental policy—particularly, educational policy—which affects children's rights to a meaningful life and to equality. The Project is funded by The Ford Foundation and the Carnegie Corporation.

At stake in this case is equality of educational opportunity for children faced with special barriers arising out of their race, ethnicity, and ancestry. Specifically, this case challenges the asserted "neutrality" of offering a public education program only in the English language when no affirmative steps are taken to integrate into such program a class of children, who, because of their ancestry, are unable to speak, write, or comprehend the prevailing means of communication in the classroom.

This is a class action on behalf of children who physically attend the public schools of the San Francisco Unified School District and who speak Chinese, but not English. Defendants have admitted and the district court found that there are a substantial number of such Chinese-speaking children who need special help in English but who receive no such help at all.

Contrary to what the courts below suggest, the injury in this case is clearly not the fault of petitioner children. They are caught between a home that can't teach them English and a school that won't. The modest proposition they assert is that non-English speaking children may look to the public schools to teach them to speak English. These children are very clearly among those whom the Childhood and Government Project was organized to assist.

SUMMARY OF ARGUMENT

Both the District Court and the majority of the Court of Appeals below have evaded the constitutional infirmity in this case by finding that Chinese-speaking children are admitted to school and are receiving "the same" instruction as all other students. This view is unrealistic. It fails to take into account the nature of education, which is nothing if it is not communication. The

courts below are only half right. The bodies of these Chinese-speaking students have been admitted to school. Their minds and spirit have been excluded because they do not speak the language of the classroom.

Plaintiff school children could not be denied admission to the public schools because of their race or ancestry. Nor, we submit, could plaintiff school children be denied admission to public school because they do not speak English. Of similar effect would be a school district regulation that said: You may come to class, but you may not participate because you do not speak English. Yet in reality, this is precisely what defendant school district has done here. Plaintiff, Chinese-speaking school children, do not have a disability. They have a cultural characteristic. By failing to take this characteristic into account and not offer special help in English, when its educational program is offered only in English, defendant School District has converted this characteristic into a functional disqualification.

This functional disqualification has been recognized by Congress and led to the adoption of Title VII of the Elementary and Secondary Education Act, 20 U.S.C. § 880b. It has also been recognized by the U.S. Department of Health, Education and Welfare and led to the promulgation on May 25, 1970 of the following guideline pursuant to Title VI of the Civil Rights Act of 1964 (Section 601, 42 U.S.C. § 2000(d)):

"Where inability to speak and understand the English language excludes national origin-minority children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11595, July 18, 1970.

When the state has undertaken to provide public education, it may not effectively deny it to some children on account of a

factor that is inextricably tied to their foreign lineage without violating the Equal Protection Clause of the Fourteenth Amendment.

Part I of this brief addresses the general problem of the functional exclusion from public education of non-English speaking children. Part II addresses the unconstitutionality of such exclusion. Part III addresses the unconstitutionality of defendants' conduct in this case.

ARGUMENT

I. A School District Effectively Denies Public Education to Non-English Speaking Children When It Offers Its Educational Program in English And Takes No Affirmative Steps to Integrate Such Children Into That Program.

If a school district were to require children to speak English before they were permitted to attend public school, the effect would be to deny public education to non-English speaking children. The exclusion need not be so blatant, however; children may be just as effectively denied public education even though they are admitted to the classroom. This would happen, for example, if the district's teachers followed a policy of not calling on or speaking to children who had Chinese names. Communication between teacher and child is the essence of education, and students who are left out are simply not receiving that communication.

Similarly, non-English speaking children are left out when the school district teaches in English and fails to take into account the fact that they do not comprehend what is being taught. If no affirmative steps are taken to integrate non-English speaking children into the district's educational program, then despite their presence they truly are cut off from that communication which comprises education. If anything, they are educationally worse off than those with Chinese names in the hypothetical suggested above; the latter, although ignored, could at least understand what

was being said. Contrary to what the majority in the Ninth Circuit below suggests, placing a child who does not speak English in a classroom is different from placing a child who is hungry or ill clothed in that same classroom. While the lack of proper food and clothing may hamper learning, the lack of the ability to speak the language is tantamount to a total deprivation.

Assuming the motives of classroom teachers are benign, non-English speaking children nevertheless are going to be effectively excluded from participation in the school's educational program. Assume that a non-English speaking child is the only one, or one of a few, in a class, the rest of whose members do speak English. Assume further that the teacher is assigned to teach reading, speaks only English, and has been given no training in how to communicate with non-English speaking children. That the education of such child or children would be largely ignored is hardly surprising. Sadly, this all too often occurs.

That this plight is a reality for many children in America today is amply demonstrated by Congressional findings which led to the adoption of Title VII of the Elementary and Secondary Act; it also led the Department of Health Education and Welfare on May 25, 1970 to promulgate guidelines pursuant to Title VI of the Civil Rights Act of 1964 mandating that affirmative steps be taken to rectify this situation.¹

1. Title VII of the Elementary and Secondary Act of 1965 provides in part "The Congress hereby finds, that one of the most acute educational problems in the United States is that which involves millions of children of limited English-speaking ability because they come from environments where the dominant language is other than English; that additional efforts be made to supplement present attempts to find adequate and constructive solutions to meet this unique and perplexing educational situation . . ." (81 Stat. 816 § 701).

See generally, U.S. Department of Health, Education and Welfare (Office of Education); "Draft: Five Year Plan 1972-1977: Bilingual Education Programs, Appendix B" (August 24, 1971). See also testimony in Hearings on S. 428 before the Special Subcommittee on Bilingual Education of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 51-55 (1967).

The functional exclusion of non-English speaking children from participation in the school's educational program is not the only injury that they experience. They are stigmatized and isolated. Daily, the child is made to feel inadequate because of his inability to learn. A sense of moral blame is cast upon him by the state. In addition, his language barriers isolate him from his fellow students, depriving him of a sense of belonging.

What is so deplorable about such effective exclusion of non-English speaking children is that there are known and effective techniques which are available to deal with this condition. When such affirmative steps are not taken, however, the condition of these children, who are compelled to attend and then are functionally excluded, is little different from those who would be barred at the schoolhouse door.

For a history of HEW's May 25, 1970 guideline, see "Project Report: De Jure Segregation of Chicanos in Texas Schools," 7 Harv. Civ. Rts.—Civ. Lib. L. Rev. 307, 365-372 (1972). Additionally, the guideline cites concerns which are explicitly related to deficiencies in English language skills of national origin group children. Specific detrimental effects include inability to effectively participate in the full educational program, assignments in classes for the mentally retarded, and tracking or ability grouping systems. (35 Fed. Reg. 11595, July 18, 1970).

II. Children Are Denied Equal Protection of the Laws When They are Effectively Denied Public Education on Account of a Factor Inextricably Tied to Their Ancestry, Namely, Their Inability to Speak English.²

(1) When a school district fails to take affirmative steps to integrate non-English speaking children into its educational program it discriminates against them. English speaking youngsters are given public education, while their non-English speaking counterparts are not. The suggestion of the majority below that the requisite "state action" is missing is simply wrong. Knowing of the existence in the district of non-English speaking children, the decision to offer only a regular program taught only in English is the action which harms such children.

The majority below observes that "every student brings to the starting line of his educational career different advantages and disadvantages . . ." which may affect his educational career "apart from any contribution by the school system." 472 F.2d 909 (9th Cir. 1973) at p. 915. It is wrong, however, to suggest that there is no "contribution" by the school system when the system elects, using the Ninth Circuit's metaphor, to run the race only in English. That is, the majority below falls into the trap of concluding that a school district's decision to offer only a regular program and offer it only in English, is unchallengeable. In the face of the known cultural characteristic of some of its pupils, this state policy, however, is the central factor contributing to

2. We have intentionally adopted as the expression of the relevant constitutional principle, the language of the guidelines promulgated on May 25, 1970 by the U.S. Department of Health, Education and Welfare (35 Fed. Reg. 11595, July 18, 1970), to implement Title VI of the Civil Rights Act of 1964. We believe that the statutory guideline aptly captures the constitutional norm. In view of this identity of principles, the arguments we make here are equally supportive of the *statutory* theory of petitioners; they are seeking relief under Title VI of the Civil Rights Act of 1964, since defendants, who receive federal financial assistance, have discriminated against them and have excluded them from effective participation in and the benefits of defendant's educational program on the grounds of national origin.

educational failure; state action is involved.³ To suggest that there is no state action here is to say that there is no state action when there is required by law a filing fee for candidates for public office⁴ or a residency requirement for seekers of welfare;⁵ but there clearly has been held to be the requisite state action in such cases.

(2) Public education discrimination based upon ancestry is invidious, and victims of such discrimination need judicial remedies. Most children in America do speak English by the time they go to school. However, there is a "discrete and insular minority"⁶ which does not; this minority is almost wholly comprised of children whose home language is not English and whose ancestors come from foreign countries.⁷ It is invidious to deny public education to children who are from, or whose ancestors are from, a foreign country because of a condition inextricably tied up with such foreign origin. What a child learns is the language of the home; a policy of teaching only in English and offering no help in English is inherently calculated to place a hurdle in front of such a minority.⁸

3. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), state neutrality was urged as a defense. The state allowed the effects of private discrimination to take place, even though it neither compelled nor condoned the result. This Court held that the state's failure affirmatively to remedy the private discrimination was state action.

4. *Bullock v. Carter*, 405 U.S. 134 (1972).

5. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

6. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See also *Keyes v. School District No. 1, Denver, Colorado*, U.S. (June 21, 1973), and the opinion of Mr. Justice Stewart in *San Antonio Independent School District v. Rodriguez*, U.S., 93 S.Ct. 1278 (1973).

7. Those from Puerto Rico probably form the major exception; that Puerto Rico is not a "foreign country," however, should not affect the rights of Puerto Rican children.

8. This is not the same thing as a neighborhood school assignment policy which produces racial isolation. The link to race there is not inex-

That a singled out class of children with foreign lineage are in need of judicial solicitude requires little argument. A sorry blot on the history of this nation is the frequency of lesser treatment of those among us who are seen as "foreigners."⁹ The hopelessness of expecting non-English speaking children themselves to bring about the needed change through the political process is evident. And to rely for political solutions on their parents, who themselves generally lack facility in the common language of political discourse in this land, is whimsical. In short, such children are a classic "suspect classification."¹⁰

(3) The denial of public education to non-English speaking children is extraordinarily debilitating to them. The bitter irony is that public school is that very place to which these children can reasonably look to overcome their inability to speak English. Indeed, language skills, particularly basic English skills,

tricable. For example, one could reasonably expect that housing policy changes would alter such racially isolating effects, and indeed, housing policy may well be the appropriate manner in which to attack this problem. Language and national ancestry are inextricable. Mexico, for example, is not going to reject Spanish as its national language, and American public schools are the ideal place for dealing with Spanish-speaking, American children of Mexican ancestry. Hence, although we do not express an opinion on the constitutionality of so-called "pure de facto" school segregation, we do insist that this is a far easier case.

9. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Yu Cong Eng v. Trinidad*, 271 U.S. 300 (1926); *Korematsu v. United States*, 323 U.S. 214 (1944); *Graham v. Richardson*, 403 U.S. 365 (1971).

10. In *Hernandez v. Texas*, 347 U.S. 475, 478 (1954), the Court said:

"Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

are at the core of what schools do teach. To impose a requirement that a child already be educated in particular language skills *before* he can effectively participate in the educational program, makes a mockery of public education.

The denial of effective participation by these children in the educational process compromises their First Amendment rights in two separate ways.¹¹ First, and in general, the effective exclusion from schooling is harmful to the exercise of First Amendment rights because public school is that institution which we most heavily rely upon for the purpose of preparing the young so that they may exercise their free speech right, their right to vote and related rights. Second, and more specifically, if the schools do not teach these children to speak English, how can they be expected, as adults, to participate in and comprehend political debate or to deal with the English language ballot?

As to the social and economic harm that befalls these children, the Congressional Hearings which led to Title VII of the Elementary and Secondary Education Act amply illustrate their magnitude.¹²

11. This case is clearly distinguishable from *San Antonio Independent School District v. Rodriguez*, U.S., 93 S.Ct. 1278 (1973), and indeed is supported by dictum therein. Here there is a readily identifiable class and there is, effectively, total deprivation. In other words, this is not a case in which the Court can say that plaintiffs at least are getting some "minimum" education; children who are left out of the educational program because of language barriers are not getting that "minimum."

12. See Hearings on S. 428 before the Special Subcommittee on Bilingual Education of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 46 (1967). Subsequent hearings on the educational problems of Chicanos, Puerto Ricans, and Indians also emphasize the severe social and economic disadvantages placed on non-English speaking children. See Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, S. Rep. No. 501, 91st Cong., 1st Sess. (1969), and Hearings on Equal Educational Opportunity Before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2d Sess., 2504 (1970).

(4) Non-English speaking children who are left out of the educational program of the classroom are stigmatized and made to feel inferior. If non-English speaking children are not integrated into a school district's educational program, their inability to speak English is a badge of inferiority. When the state compels the child to attend school, it may only justify this restraint on his liberty with the benefits of education. The non-English speaking child is confined to the classroom and is not benefited; that his liberty is so casually infringed is insulting.

These children, as testimony before Congressional committees shows, are not treated as exotic rarities, as might be an American professor's children when they are enrolled in Italian schools while the family spends a sabbatical year in Florence. The non-English speaking child in American schools is branded; that he cannot speak English is treated by the state as a mark of disgrace. The very manner in which the child speaks is held against him and is what excludes him from the educational program. Indeed, the whole class understands that the program is designed to teach some of the children but not others. This is like the state holding the color of your skin against you.¹³ This is what it means to be "stigmatized."

It is not surprising that the child, lacking the sophistication to damn the system, views himself as wrong not wronged. If he cannot participate in the program, as he sees the other children doing, he reasons that it is his own fault. Not only is he burdened with an inability, but with a sense of shame for his inadequacy. If the Court of Appeals can imply that the child is at fault, surely it is not too much to imagine that the school itself conveys a like message to the child. This attitude, latent as it may well be, nevertheless confirms the child's diminished perception of his self-worth.

13. In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1947), the Court struck down separate treatment of a student who was in the same classroom. The Court found that this apartness denied the black, separated student the intangibles of education—the good opinion and the association of his fellow students.

The district's election not to teach him to speak English is also isolating. If language barriers are not removed, non-English speaking children are necessarily separated from their classmates. To be sure, it may be both stigmatizing and isolating to be taken aside and taught English when everybody else already knows how to speak English. But that separation is calculated to be temporary and hence will be far less severe than the effective isolation the district perpetuates by offering no such help.

Of course, we agree that the district has a very strong interest in seeing that a national origin group is not segregated. But this interest may not be interposed to close off special help to Chinese- or Spanish-speaking children. Physical integration, purely for its own sake, when effective classroom isolation occurs is not what the equal protection clause ever intended.¹⁴ Finally, we respect the societal interest in having a single national tongue, but that interest is frustrated, not furthered, by failing to teach English to children who speak other tongues.

(5) The school district may not justify its failure to take affirmative steps to integrate non-English speaking children into its educational program with arguments suggesting that it is not the school's job to teach children to speak English. The school has a duty to teach children to speak English and may not leave it entirely to the family. It is unreasonable to expect children themselves to be responsible for assuring that they speak English by the time they start school. And it is highly unfair to punish children for the failure of their parents, particularly when their parents do not speak English. We do not disagree with those who believe that parents also owe duties to their children, but when the parents fail, the penalty should not be visited on the children.

14. As to the importance of the public school system taking into account many other interests besides "integration for its own sake", see the opinion of Mr. Justice Powell in *Keyes v. School District No. 1, Denver, Colorado*, U.S. (June 21, 1973).

Since the foundation of future school learning is based on the ability to speak English, to fail to teach English on the grounds that it is the family's job, is an impermissibly constrained definition of the school role. It is inconsistent with the responsibility society has invested in the public education system. To allow the schools such a limited view of their undertaking is incompatible with society's past willingness to afford a great measure of independence to them with respect to the manner in which they deal with the young. Acting as though all children come to school in exactly the same condition and need exactly the same treatment is not only preposterous, but also dramatically unlike the way schools actually operate as a general matter.¹⁵

The attitude that immigrants to this country in years past have always "managed" and the accompanying disapproval of Mexican, Puerto Rican, Chinese and other children for asking the Supreme Court for help has a kind of smugness about it we find frightening. Given a sufficient number of generations most people will be assimilated; the rights of the current generation of children should not be sacrificed in the name of that eventuality. The patience that is thereby demanded is unsuited to today's world. Not only is education more important today than it has ever been in the past, but as a nation we are more intolerant of injustices to minorities, particularly children, than we have been in the past.

Finally, we chafe at treating this attitude toward those children who do not speak English as legitimate. It reflects the "rite of initiation" mentally that the equal protection clause was specifically designed to outlaw. Furthermore, if this attitude is not venal

15. Public schools generally offer a wide range of special educational programs to meet different (individual) needs. These include programs for educationally handicapped, emotionally disturbed, educable or trainable retarded, blind, deaf, physically handicapped, multihandicapped, and mentally gifted.

it is short sighted; the entire nation is the loser if these children are denied public education.¹⁶

(6) The school district may not justify its failure to take affirmative steps to integrate non-English speaking children into its educational program with arguments about costs and cost effectiveness. We wish to dispose at the outset of any suggestion that the school does not know how to teach these children to speak English. That the institution which teaches German, French, and Spanish easily enough, and offers "English" for all twelve grades could even suggest that it is unable to teach non-English speaking children to speak English is ludicrous on its face. Moreover, such a claim is simply false since known and effective techniques for teaching English do exist. The availability of such techniques alone is convincing evidence to counter any further suggestion that it would be futile to try to teach such children. We do not anticipate, however, that the school districts would make such simplistic arguments. Rather, more sophisticated assertions might be expected.

One such argument is that "affirmative steps" do not help children to learn English any faster than when they are ignored and hence such steps are a waste of money. It is not beyond comprehension for this to be true, although it is a sad comment on school effectiveness. However, it is an argument which we submit the school district has the burden of proving. Since both Congress and the Department of Health Education and Welfare have concluded that affirmative steps are needed and have called upon school districts to take them, it is at least a rebuttable presumption that such steps are helpful.¹⁷

A different argument is that it costs money to take affirmative steps, money which the district does not have. It seems to us that

16. See especially *Abington School District v. Schempp*, 374 U.S. 203 (1963), concurring opinion by Mr. Justice Brennan at 230.

17. Cf. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); and *Keyes v. School District No. 1, Denver, Colorado*, U.S. (June 21, 1973).

a more valid characterization of the situation is that the school district is wasting money by having these children in programs they cannot comprehend and that such money could be far better employed in teaching them English.

Indeed, one of the mysteries is why a school district does not do precisely this, particularly when it has among its pupils what amount to classrooms full of non-English speaking children. The answer, it seems, is that the districts already have on their pay-rolls people who are not trained to teach such children, and they feel politically constrained not to replace such teachers (many of whom are tenured) with those who are so trained. Moreover, declining enrollment in many cities means that there are few, if any, positions opening up through attrition. We by no means insist that teachers must be replaced. We do submit, that a district may not refuse to retrain them, or hire additional English teaching specialists or do whatever else may be appropriate by hiding behind the "no money" claim. School districts have taxing power and resources which they are presently employing for the purpose of educating English speaking children. Relief should not be viewed as something which necessarily requires extra funds for non-English speaking children; rather it is that a fair share of the district's funds, whatever their amount, should be employed for their benefit. To say simply that there is "no money" for those who are effectively denied education is ultimately, therefore, as unjustifiable as asserting lack of money as the reason for continuing to refuse entry to children previously unconstitutionally barred at the door.

Finally the school district might assert that the cost of doing anything very helpful for non-English speaking children is unreasonably high; by that it would mean either that taxpayers would be unreasonably burdened or other children would be unreasonably harmed from having resources shifted away from

them. Were this argument something the school district could "prove" and not merely "assert", then it would be an effective argument. We are not asking the school district to do what is unreasonable to do. But we believe the burden of proving such an assertion is justly on the school district in view of the facts that (a) this is a matter involving a suspect classification, (b) the interest involved—public education—is so important, (c) Congress and HEW have already concluded that it is important to take affirmative steps to help such children, and Congress is providing help to districts to meet their obligations.¹⁸

(7) A constitutional requirement that school districts take affirmative steps to integrate non-English speaking children into their educational program is neither a judicially unmanageable command nor an empty gesture. Since we claim that constitutional rights are being violated, it is important that the duty imposed on school districts be reasonably calculated to terminate the denial of such rights. Moreover, school districts are entitled to have some idea what is meant by the phrase "affirmative steps." And this Court is entitled to some explanation of how representatives of non-English speaking children and school districts (and ultimately federal district courts) are to resolve disputes which are bound to arise over whether the school district has taken "affirmative steps" when it claims to have. This section addresses these matters.

Essentially, we submit, the test is whether the school district, in light of all the facts and circumstances, is making a reasonable effort to educate non-English speaking children when compared with the effort made for those who do speak English. Such an effort would be an enormous gain for non-English speaking children.

18. In fact, teaching non-English speaking children is, fortunately, not a terribly expensive proposition; it does not involve the same costs as might be involved in teaching autistic children, for example.

A "reasonableness" standard is one which people understand. It also is familiar judicial standard, in both common law and constitutional litigation. And like the prohibition against unreasonable searches and seizures certain rules can be worked out. For example, the half-way measure of providing English instruction to some non-English speaking children in the district but not to others, in the absence of special circumstances that might explain this, would not constitute "affirmative steps"—that is, it would not display reasonable effort to educate the ignored children.

The "reasonableness" standard does not, however, include any specific pedagogic content. It will not matter constitutionally whether a school district chooses (1) to devote itself to teaching non-English speaking children to speak English with the idea that they will soon be able to participate in regular classes or (2) to teach various skills to non-English speaking children in the language they already speak, while more slowly teaching them to speak English, or (3) to train regular classroom teachers to involve the class in the English teaching of the non-English speaking children, simultaneously with the carrying out of the general education of the entire class, or any number of possible approaches.

Indeed, once the school district has a program reasonably calculated to educate all of its children, a federal district court, we think, should defer to the professional judgment of the district, unless it can be shown that the "program" is a sham so far as non-English speaking children are concerned. We want to emphasize that the "reasonableness" test does not require success. That is, the school need not do whatever is necessary to assure that formerly non-English speaking children do as well on standard school achievement tests as do children who come to school speaking English. Nor must the school assure that all the non-English speaking children in fact are speaking English by a certain

date. Its efforts will be gauged in terms of inputs—the offering made available to these children; does that offering display the kind of effort that is made for those who do speak English?

Once such a constitutional command exists, and so long as the power of the federal courts remains available to deal with unreasonable school districts, it is fair to rely largely on the political process to develop programs from place to place. Along these lines, however, we would think that a district could expect that its actions would more easily be judged as reasonable were it to involve representatives of non-English speaking children in the planning of their educational program.

(8) Vindication of the constitutional rights of non-English speaking school children should not be thwarted by fears of an uncontrollable flood of litigation brought by non-English speaking persons in other areas. If anything, a decision in favor of non-English speaking school children will limit the pressure for other such cases. That is, to insist that the public schools take responsibility for teaching English to the young is the single most promising thing that can be done to assure access to the rights and liberties from which people now find themselves cut off because of language barriers.

In the meantime, when government action operates to injure persons who do not speak English, a careful examination will be required in each case. This is the meaning of the "strict scrutiny" standard as applied to cases involving "suspect classifications." This Court is already quite familiar with applying the standard to superficially neutral rules that single out the poor¹⁹ or blacks,²⁰

19. Cf. *Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956); *Boddie v. State of Connecticut*, 401 U.S. 371 (1971); and *U.S. v. Kras*, U.S., 93 S.Ct. 631 (1973).

20. Cf. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Jefferson v. Hackney*, 406 U.S. 535 (1972); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As to Chinese-speaking people, see *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

and hence should feel confident about its ability to apply it to cases involving non-English speaking persons.

For example, the Constitution may require that a non-English speaking criminal defendant have the services of an interpreter at a trial,²¹ and that a non-English speaking voter be able to bring an interpreter into the voting booth with him.²² However, if the booklet given to prospective drivers containing the "rules of the road" is printed only in English, this would not seem to rise to the level of a constitutional violation.²³

As we have argued throughout, since education is so important to children and since public schools are so naturally suited to take the needed action to provide such education to non-English speaking children, the denial of such education on account of language barriers must be precluded by the Constitution.²⁴

21. Cf. *Negron v. New York*, 434 F.2d 386 (2nd Cir., 1970).

22. Cf. *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex., 1970); *Puerto Rican Organization for Political Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill., 1972).

23. On the other hand, if the examination needed to obtain the driving license is only given in English, then the constitutional outcome to a challenge to that practice would depend, among other things, upon the fact that adults are involved, and upon both how important the Court really thinks access to a driving license is, and how reasonable it is to require an understanding of English as a precondition to driving, in the interest of the safety of others. See *Bell v. Burson*, 402 U.S. 535 (1971).

24. Although we have argued this case as a denial of "equal protection" which we think is the best analysis, we believe that it is also well phrased as (1) a denial of "substantive due process"—when children are compelled to attend school they have a right to treatment, not confinement, see, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781 (N.D. Ala., 1971); or (2) a denial of "procedural due process"—the state has conclusively presumed that those children who do not speak English are not deserving of education, see e.g., *Vlandis v. Kline*, 41 L.W. 4796 (June 12, 1973), *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Bell v. Burson*, 402 U.S. 535 (1971).

III. In the Case Before the Court Petitioners' Constitutional Rights Have Been Violated.

A final question is whether or not, on the record before the Court, it can be determined if petitioners' constitutional rights have been violated. We assert that a determination can be made and that the defendant school district has violated their rights. We point to two things in support of this. First, the defendant school district admits that it does the "same thing" for these non-English speaking children as it does for the rest of its children; indeed, that is how it attempts, unsuccessfully, to argue that "state action" is missing. This admission reveals a failure to show the same degree of concern for the petitioners' education as that shown for other children in the district. Second, the defendants admit that petitioners need help in English, that others who have similar problems are getting such help, but that petitioners are not getting such help. That also bespeaks of a failure to be concerned about their education.

CONCLUSION

For the reasons given, we respectfully urge that the decision of the Court of Appeals be reversed.

STEPHEN D. SUGARMAN

F. RAYMOND MARKS

DAVID L. KIRP

ROBERT H. MNOOKIN

MARK G. YUDOF

Attorneys for Amicus Curiae

Childhood and Government Project*

*We wish to acknowledge the assistance and collegueship of two research associates, Ellen Widess and Sarah Leverett, law students at Boalt Hall.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, *et al.*,
Petitioners,

v.

ALAN H. NICHOLS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

**BRIEF FOR THE NATIONAL EDUCATION
ASSOCIATION AND THE CALIFORNIA TEACHERS
ASSOCIATION AS AMICI CURIAE**

INTEREST OF THE AMICI CURIAE

All parties have consented to the filing of this brief on behalf of the National Education Association and the California Teachers Association as amici curiae in support of the position of the petitioners.¹

¹ The consents of both the petitioners and the respondents are being filed with the Clerk of the Court in accordance with Rule 42 (2) of the Rules of the Court.

The National Education Association ("NEA") is an independent voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. NEA was founded in 1857, chartered by Congress in 1906, and has more than one million three hundred thousand members. The California Teachers Association ("CTA"), the California state affiliate of NEA, has more than 140,000 regular members. One of the principal purposes of the NEA and the CTA is to promote the education of all children in the United States. 34 Stat. 805.

The interest of the amici curiae in this case stems from that purpose. The principal questions presented are whether the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and the regulations thereunder, permit a public school system to instruct non-English speaking children all day in classes taught in English, without assisting the children to learn English, thus effectively excluding many of the children from the benefits of public education. The NEA and the CTA are concerned with the plight of non-English speaking students trapped in schools where they cannot learn. The harm done by failing to meet the needs of non-English speaking children in the public schools has been described and documented by NEA in *The Invisible Minority* (1966), reprinted as part of the Hearings before the General Subcommittee on Education of the House Committee on Education and Labor on H.R. 9840 and 10224, Bilingual Education Program, 90th Cong., 1st Sess. pp. 168-210, and included in the record in this case.² In 1972 the Representative Assembly of NEA adopted a Continuing Resolution urging the provision of "necessary funds and . . . material . . . for students to whom English must be

² Plaintiff's Exhibit No. 1.

taught as a second language." NEA, 1973 *Handbook*, at 55.

However, the court below, asserting that the children's problem is "the result of deficiencies created by [the children] themselves in failing to learn the English language" (A. 133),³ held that the requirements of the Equal Protection Clause are satisfied as long as the school system provides the children "with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district" (A. 132). That holding sanctions the effective exclusion from public education of a substantial number of non-English speaking children in the United States today. The practical exclusion of those children, because of factors for which the children themselves are not responsible, is a matter of the gravest concern to those who, like the amici, are interested in the education of *all* children in the United States.⁴

STATEMENT

Petitioners represent San Francisco children of Chinese descent who do not speak or understand English and receive no instruction to teach them English, although English is the language of instruction in the San Francisco public schools (A. 113-114). In consequence, the children do not understand their teachers or textbooks and benefit little from their schooling (A. 61-64, 71-78, 96-110).

³ Citations to "A." are to the Appendix in this case.

⁴ The NEA and its State affiliates have participated as *amici curiae* in numerous recent cases before this Court involving the provision of equal educational opportunity. *E.g.*, *Keyes v. School District No. 1*, 41 U.S.L.W. 5002 (June 21, 1973); *San Antonio Ind. School District v. Rodriguez*, 41 U.S.L.W. 4407 (March 21, 1973); *School Board of the City of Richmond v. State Board of Education*, 41 U.S.L.W. 4685 (May 21, 1973).

The consequences of respondents' failure to teach petitioners English, and thereby to open their educational program to petitioners, are severe. That is demonstrated dramatically by respondents' own applications for federal funds. According to respondents, when non-English speaking children of Chinese extraction in San Francisco "are placed in grade levels according to their age and are expected to compete with their English speaking peers, they are frustrated by their inability to understand the regular class work. The problem is particularly severe for those in the high school age group. . . . Few are motivated to continue through adult school and they become dropouts" (A. 101). "For children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto" (A. 103-104) — a ghetto in which one finds "substandard housing, overcrowded living quarters, the highest TB and suicide rates in the city, [and] severe unemployment and underemployment" (A. 100). "Chinatown has become a slum as well as a ghetto" (A. 101). "The only hope of removing this cause of poverty lies in adequate education" (A. 104).

So too, the United States Commission on Civil Rights has published studies documenting the exclusion of Spanish-speaking children from the benefits of educational programs in this country, noting that "ability to communicate is essential to attain an education, to conduct affairs of state and commerce, and, generally, to exercise the rights of citizenship."⁵ In the political arena, non-English speaking citizens are seriously handicapped; as the court below observed, "an appreciation of English is

⁵ U.S. Comm. on Civil Rights, Mexican-American Education Study, Report No. III, *The Excluded Student* (1972), p. 13 and *passim*; see also Report No. V, *Teachers and Students* (1973), pp. 43-44 and *passim*; Report No. II, *The Unfinished Education* (1971), *passim*.

essential to an understanding of legislative and judicial proceedings, and of the laws of the State," and indeed is a prerequisite for naturalization as a citizen (A. 127). Economically, as respondents have demonstrated so cogently in applications for federal funds, non-English speaking children are doomed to become "dropout[s]" and "unemployable[s] in the ghetto" unless they are taught English (A. 103-104).

Accordingly, petitioners sought in this action, brought under 42 U.S.C. § 1983, to require respondents to provide them assistance in learning English so that they might benefit from school as other children do. They contended that respondents' failure to provide such assistance violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 and regulations thereunder. (A. 6, 16-19, 23-24.)

The court below rejected petitioners' claims. It concluded that petitioners are entitled only to "the same facilities, textbooks, teachers and curriculum as is provided to other children in the district," because their "language deficiency . . . was not caused directly or indirectly by any State action" (A. 127). One member of the original panel, Judge Hill, dissented (A. 131-139), and the decision provoked a request for rehearing en banc by a member of the court who was not a member of the original panel (A. 141). A rehearing en banc was denied after certiorari was granted (A. 140, 141), but the denial of a rehearing produced a dissenting opinion by two members of the court who were not members of the original panel, Judges Hufstedler and Ely (A. 141-147).

SUMMARY OF ARGUMENT

We show in this brief that the decision below was incorrect. To be sure, respondents did not "cause" petitioners' "language deficiency." However, they "cause"—

in fact they *require*—petitioners to attend classes taught in English without assistance in learning the language. Petitioners cannot benefit from those classes, unlike their English-speaking peers. Thus, respondents' practices deny an education to these children who do not speak English, a characteristic determined by the national origin of their parents.

Under the Equal Protection Clause, practices that disadvantage a minority of that kind are suspect. They require strict judicial scrutiny and cannot be sustained unless the responsible governmental authorities can show that they serve a compelling state interest. Respondents have not attempted to make such a showing. In fact, respondents' policies have no rational basis in any system of universal compulsory education.

Moreover, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of national origin in federally assisted programs and activities (42 U.S.C. § 2000d). Regulations thereunder expressly prohibit discrimination on the basis of national origin in public schools receiving federal funds (45 C.F.R. § 80.5). HEW guidelines state that those prohibitions require school districts to take affirmative steps to remedy the inability to speak and understand English when failure to do so will exclude national origin-minority group children from effective participation in the educational program (35 Fed. Reg. 11595). The San Francisco public schools receive federal financial assistance, and in exchange for federal aid have *expressly* agreed to comply with Title VI and "all requirements imposed by or pursuant to" the HEW regulations.* Therefore, the failure to teach petitioners English violates Title VI and the regulations and respondents' express assurances.

* See the appendix to this brief; 45 C.F.R. § 80.4.

Accordingly, the decision below should be reversed on both constitutional and nonconstitutional grounds.

ARGUMENT

I

RESPONDENTS' PRACTICES VIOLATE THE EQUAL PROTECTION CLAUSE

English is the language in which classes are taught in the San Francisco public schools. Petitioners are required to attend those schools by California's compulsory attendance law. Calif. Ed. Code § 12101. However, petitioners speak only Chinese; they do not understand English. Therefore, as the parties below agreed, they need help in learning English in order to benefit from their classroom programs. (A. 60-70, 71-78, 97-104, 113-114).⁷ In the words of respondents' Superintendent of Schools, such children need "to learn English so that they can communicate with others and proceed normally with classroom work" (A. 61).

Petitioners are not receiving that help. They sit uncomprehendingly in classes in which they cannot participate and from which they cannot benefit—classes designed only to meet the educational needs of San Francisco's English-speaking children. As the district court observed, "They are not studying and they are not learning . . . , you can't call them students. They need something, and that something is language instruction."⁸ As Judges Hufstедler and Ely stated, "Access to education offered by the public schools is completely foreclosed to these

⁷ See also transcript of hearing, May 12, 1970, pp. 2-3 (record on appeal, vol. II, pp. 2-3).

⁸ Transcript of hearing, May 12, 1970, p. 18 (record on appeal, vol. II, p. 18).

children who cannot comprehend any of it. They are functionally deaf and mute." (A. 142.)

Thus, respondents' failure to teach petitioners the language in which respondents conduct their classes denies these children an education, unlike their English-speaking peers. The San Francisco system thereby discriminates against children like the petitioners. The fact of discrimination cannot seriously be contested. The question presented is whether the discrimination is permissible.

The court below was of the view that the discrimination involved in the case is permissible because respondents are not responsible for petitioners' language "deficiencies"—that the denial of education to petitioners "is not the result of laws enacted by the State presently or historically, but the result of deficiencies created by appellants themselves in failing to learn the English language" (A. 133). However, as Judges Hufstedler and Ely noted—

"The state's response to the non-English speaking Chinese children is not passive. The state compels the children to attend school (Cal. Educ. Code § 12101), mandates English as the basic language of instruction (Cal. Educ. Code § 71), and imposes mastery of English as a prerequisite to graduation from public high school (Cal. Educ. Code § 8573). The pervasive involvement of the State with the very language problem challenged forbids the majority's finding of no state action." (A. 143.)

Respondents meet the particular educational needs of virtually all children in San Francisco in circumstances where failure to do so will result in a denial of education to the children.* Approximately ten percent of the

* The California Education Code provides for programs for physically handicapped children, § 6801 et seq., for mentally retarded children, § 6901 et seq., for deaf children, § 12801 et seq., and for "educationally handicapped" children, § 6750 et seq. In addition, the Code authorizes programs for children with reading disabili-

children in San Francisco have such needs. With the exception of children like the petitioners, who speak languages other than English, those needs are being met (A. 94-96, 26-27, 33, 55, 58). Effective techniques¹⁰ and qualified teachers¹¹ are readily available to teach petitioners English. In short, respondents incontestably are responsible for what goes on in their classrooms. They cannot seriously deny responsibility for choosing not to teach petitioners English or otherwise helping them to learn, or for the inevitable consequences of that choice—the discriminatory exclusion of petitioners from education. *E.g.*, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 930-931 (2d Cir., 1968); see also *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1172-1173 (5th Cir., 1972) (en banc).

Under this Court's previous decisions, it is clear that the discriminatory denial of education that results from

ties, § 5770 et seq., disadvantaged children including those who are language handicapped, § 6450 et seq., non-English speaking children, §§ 71, 5761 et seq., 6060, and children who need special instruction in English, § 6499.200. Finally, the Code authorizes programs for all other exceptional children, § 6870 et seq. The Attorney General of California has ruled that the provisions of the Education Code "make clear that any minor who is . . . physically handicapped or mentally retarded . . . shall be furnished with [appropriate] education." 39 Ops. Atty. Gen. Calif. 149, 151 (1962). Pursuant to these provisions, San Francisco provides programs for virtually all kinds of mentally, physically and educationally handicapped children (A. 94-96), *except* numbers of children like petitioners who speak a language other than English, principally Spanish and Chinese (A. 26-27, 33, 55, 58). Indeed, San Francisco presumably offers a variety of elective courses for secondary students to meet those students' particular educational objectives, even though the failure to provide the courses, unlike failure to teach English to petitioners, would not deprive any student of access to education. *E.g.*, Calif. Ed. Code §§ 18251, et seq. (driver education); 5901 et seq. (vocational training).

¹⁰ See Brief Amicus Curiae of the Center for Law and Education, Harvard University, in Support of Petition for Certiorari, p. 11 at n. 6.

¹¹ See Plaintiffs' Affidavits of Wilfred Ho and Fletcher Chan (record on appeal, vol. I, pp. 188-191).

refusing to teach children the language in which their classes are conducted or to help them to learn in some other way is *not* permissible under the Equal Protection Clause. This has become "an English-speaking nation," as the court below observed (A. 132). Children who speak Chinese are a distinct racial and ethnic minority, and the language they speak is determined by the national origin of their parents. Respondents' practices disadvantage those children as a class. Under the Equal Protection Clause, governmental practices that disadvantage a class of that kind are "immediately suspect." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).¹² Since respondents' practices "operate to the peculiar disadvantage of [a] suspect class," *San Antonio Ind. School District v. Rodriguez*, *supra*, slip op., p. 24, they demand "strict judicial scrutiny"; they are "not entitled to the usual presumption of validity"; respondents "must carry a 'heavy burden of justification'"; and respondents must show that the "educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objections." *Id.*, at 12.¹³

In short, respondents must show that their practices that deny petitioners an education are justified by a

¹² See also *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *San Antonio Ind. School District v. Rodriguez*, *supra*, slip op., at 13, 24, and concurring opinion of Stewart, J., at 3; *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Oyama v. California*, 332 U.S. 633, 644-646 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹³ It does not matter that some children of Chinese descent speak and understand English, and therefore that respondents' practices discriminate only against non-English speaking children of minority national origin. *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926). The language spoken by the non-English speaking children is a characteristic of their national origin, and in any event there is no justification for discrimination against any "readily isolated segment" (*Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960)) or "definable category" (*San Antonio Ind. School District v. Rodriguez*, *supra*, at 20) of an ethnic minority.

compelling state interest. Respondents have not attempted to make such a showing at any time in the course of this litigation. Accordingly, the decision below should be reversed.

In fact, even if respondents' practices did not involve a "suspect" class and therefore were subject to a less stringent test of equal protection, they could not be defended because they do not have any "rational relation" to the California system of universal compulsory education; they have no "rational basis" in California policy. The purpose of California's educational system is, of course, to educate. As stated in the state constitution, "a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people. . . ." Calif. Const., art. IX, § 1. Under the state compulsory attendance law, that purpose extends to "each child" in the State between the ages of 6 and 16. Calif. Ed. Code § 12101. Moreover, it is the statutory "policy of the state to insure mastery of English by all pupils in the schools." Calif. Ed. Code § 71.¹⁴

¹⁴ Section 71 of the California Education Code provides that "English shall be the basic language of instruction in all schools"; states that "[i]t is the policy of the state to insure the mastery of English by all pupils in the schools"; and authorizes local school districts to offer bilingual instruction when it "is educationally advantageous to the pupils" (A. 64). According to the former State Superintendent of Public Instruction, the "intent of the law is to permit the non-English speaking child to progress in his studies in his native language while learning the English language until he reaches that stage of language development where he can compete successfully with his peers in [English]" (A. 64-65). Pursuant to that objective, the legislature has enacted the Bilingual Education Act to "develop in each child fluency in English so that he may then be enrolled in the regular program in which English is the language of instruction" (Calif. Ed. Code § 5761 *et seq.*). California school districts are authorized to "establish and maintain special programs or classes . . . in speaking, reading and writing the English language for foreign-born minors and native-born minors." Calif. Ed. Code § 6061. See also Calif. Ed. Code §§ 6457, 6499.200, 18187.6. And, the Code further provides that mandatory

Refusing to teach petitioners English is flatly opposed to policies expressed in those statutory provisions. It cannot be reconciled with the state policy "to insure mastery of English by *all* pupils in the schools." Calif. Ed. Code § 71 (emphasis added). And, since the failure to teach petitioners English excludes them from the benefits of education, the practice cannot be reconciled with the fundamental state policy of educating "*each child*" in the State between the ages of 6 and 16, expressed in the compulsory attendance law. Indeed, respondents' practices deny education to children whose need for it is greatest, according to respondents' own publications. See pp. 4-5, *supra*. Therefore, respondents' failure to teach non-English speaking children the language in which respondents conduct their classes or to make it possible in some other fashion for the children to learn has no "rational basis" in California policy. It is plainly opposed to fundamental policies of the State. It "spites [the State's] own articulated goals." *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

To be sure, experts differ as to the best way to teach English to non-English speaking children. Some experts advocate "bilingual" programs taught by bilingual teachers who understand the student's original language, while others prefer programs taught by teachers who speak only English but are trained in techniques of teaching the language to non-English speaking children.¹⁵

courses of study shall include "English, including knowledge of, and appreciation for literature and the language, as well as the skills of speaking, reading, listening, spelling, handwriting, and composition" (Calif. Ed. Code § 8551(a)), and that mastery of English shall be required for graduation from high school (Calif. Ed. Code § 8573).

¹⁵ U.S. Comm. on Civil Rights, *The Excluded Student* (1972), pp. 21-29, 48-49; Andersson and Boyer, *Bilingual Schooling in the United States* (G.P.O., 1969), vol. 1, p. 12.

There is *no* responsible support, however, for San Francisco's ostrich-like approach to petitioners—simply ignoring their needs. Indeed, San Francisco's school authorities agree with everyone else that these children “need . . . *instruction*” in English “to enable them to function effectively in a regular class” (A. 61) (emphasis added). The question here is not whether one educational technique or another is preferable, but whether the school district can refuse to provide any meaningful language instruction, and thus any meaningful education, to petitioners in these circumstances.

It is no answer to say, as did the court below, that “[a]s long as there is no discrimination by race or national origin, . . . the States should be free to set their educational policies, . . . subject only to the requirement that their classifications be rationally related to the purposes for which they were created” (A. 129). As we have shown, respondents' approach *does* discriminate by national origin. And apart from that, practices that deny a particular group of children “mastery of English” and the benefits of education, far from being “rationally related” to the purposes of any system of universal public education, are wholly at odds with those purposes.

Nor is it possible to defend respondents' practices on the ground that the “only classification in the instant case is the decision to use English as the language of instruction” (Resp. Br. Opp. 12), a decision said to be reasonable because, in the words of the court below,—

“ . . . the State's use of English as the language of instruction . . . is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. § 1423(1); likewise, California requires

knowledge of the language for jury service, Cal. Code Civ. P. § 198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the State, Cal. Const. art. IV, § 24; Cal. Code Civ. P. § 185, and of the nation . . ." (A. 127).

To be sure, those considerations may well justify the choice of English as the language of instruction. However, it is not the decision to use English as the language of instruction that is challenged in this case, but respondents' failure to provide educationally for a class of children who cannot understand English. That is the practice that gives rise to the challenged differentiation—between children who are educated and those who are not. The considerations advanced by the court below to justify the choice of English as the language of instruction show that petitioners *should* be taught English. They obviously do not justify a *refusal* to teach petitioners the language.

Nor is it an answer to say that all children in San Francisco are provided the "same facilities, textbooks, teachers and curriculum" (A. 128). By a parity of reasoning, blind children can be expected to read textbooks they cannot see, deaf children can be required to understand lectures they cannot hear, and children in wheelchairs can be asked to make their way to classrooms accessible only by climbing stairs.¹⁰ That is the kind of reasoning

¹⁰ The educational rights of mentally and physically handicapped children are currently the subject of a number of cases pending in the lower courts. *E.g.*, *Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C., 1972); *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa., 1971). There is a substantial basis for the claim by handicapped children that they cannot lawfully be subjected to practices that deny them access to education because their exclusion from education serves no compelling state interest, and they constitute a "suspect" class for purposes of equal protection in that they are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness

to which Anatole France referred: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (concurring opinion of Mr. Justice Frankfurter). As Judges Hufstедler and Ely observed, "The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk." (A. 144.) In fact, San Francisco provides all kinds of special programs to meet individual educational needs of particular children.¹⁷ Therefore it simply is not true that all children are provided the "same facilities, textbooks, teachers and curriculum."

The view of the court below was based on the misconception that the question presented is whether the schools must meet the "special" educational problems of each child who has a problem that "can be overcome" (A. 126). That is not the question in this case for no such broad claim has been made here. Rather, petitioners claim that practices which exclude minority children from education because of characteristics determined by their national origin serve no compelling state interest, and indeed, have no "rational relation" to any system of universal compulsory education.

Finally, it is not relevant to point out, as did the court below, that "the Equal Protection Clause does not require that a state must choose between attacking every aspect

as to command extraordinary protection from the majoritarian political process." *San Antonio Ind. School District v. Rodriguez*, *supra*, slip. op., p. 24. Moreover, even if that were not the case, there is a substantial basis for contending that there is no "rational basis" for the total exclusion of handicapped children from a system of universal compulsory public education. See *id.* at 47. However, there is no need in this case to pass on the claims of these other groups of children.

¹⁷ See footnote 9, *supra*.

of a problem or not attacking the problem at all," or that "a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'" (A. 129). The refusal to teach petitioners English excludes them from education. A judgment that the "problem" of educating California children should be "attacked" "one step at a time" by leaving some children out altogether is contrary to the policy, expressed in the State's compulsory attendance law, and educating "each" child (Calif. Ed. Code § 12101); and a decision not to teach English to non-English speaking children is opposed to the State's policy of insuring "mastery of English by *all* pupils in the schools" (Calif. Ed. Code § 71, emphasis added). Moreover, even if California policy were otherwise, a decision to attack the "problem" of educating children by *denying* education to a class of children *determined by their national origin*, either for wholly arbitrary reasons or simply to avoid expense,¹⁸ discriminates indvidiously against the children who are denied education, and therefore is impermissible under the Equal Protection Clause. Perhaps States may conduct lotteries to raise revenue for education, but surely they should not be allowed to make a lottery out of education itself. "[T]he opportunity of an education, . . . where the state has undertaken to provide it, is a right which must be made available to *all* on equal terms." *Brown v.*

¹⁸ We note that San Francisco has never claimed that added expense justifies its treatment of petitioners. Even if that were not the case, however, expense would not be a legitimate excuse for an otherwise invidious discrimination, *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), and therefore is no excuse for refusing to provide education for some children while providing it for others. As stated in *Mills v. Board of Education*, *supra*, 348 F. Supp., at 876: "If sufficient funds are not available . . . then the available funds must be expended equitably in such a manner that no child is entirely excluded from publicly supported education." That is the effect of respondents' practices here.

Board of Education, 347 U.S. 483, 493 (1954) (emphasis added); *San Antonio Ind. School District v. Rodriguez*, *supra*, slip op., p. 26.

Thus, when this Court sustained the Texas system of school finance in *San Antonio Ind. School District v. Rodriguez*, *supra*, it emphasized that the Texas system did not result in "an absolute deprivation of education" for any child or identifiable group of children, and that instead the system assured "every child in every school district an adequate education." *Id.*, slip op., p. 20, nn. 59, 60 (emphasis added). The rationality of the State's arrangements in that regard, in a system of universal compulsory education, could be defended *precisely* because they were "responsive to . . . two forces"—they encouraged local participation, "[w]hile assuring a basic education for every child in the State." *Id.*, at 45 (emphasis added). Here, however, the challenged practice insures that some children will *not* receive an adequate basic education, or indeed any education at all. Unlike the Texas system of school finance, the practice challenged here has no rational relation to the State's system of universal compulsory education.

As Judges Hufstедler and Ely concluded, respondents "did not meet even" the "minimal burden" imposed by the "rational relation" test. Their "obligation was to meet the far more stringent test of strict scrutiny." (A. 145, 146.) Therefore, the failure to teach petitioners the language of instruction violates the Equal Protection Clause. The decision below to the contrary accordingly should be reversed.

II

**RESPONDENTS' PRACTICES VIOLATE TITLE VI OF
THE CIVIL RIGHTS ACT OF 1964, AND THE
REGULATIONS AND RESPONDENTS'
ASSURANCES THEREUNDER**

Apart from the constitutional violation discussed in Part I of this brief, respondents' failure to teach petitioners English violates Section 601 of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, the regulations thereunder, and respondents' assurances to the Department of Health, Education and Welfare, made to obtain federal funds. Therefore, the Court need not reach the constitutional issue. "If a violation of § 2000d is shown by the proof, [the court] need not reach the constitutional questions, and it is a favored policy of federal courts to decide cases on statutory grounds wherever possible." *Ward v. Winstead*, 314 F. Supp. 1255 (N.D. Miss., 1970) (three-judge court, per Judge Keady). The court below rejected petitioners' contentions as to Title VI perfunctorily.¹⁹ Its decision in that regard was erroneous.

Title VI provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" because of his "race, color or national origin." 42 U.S.C. § 2000d.²⁰

¹⁹ In its opinion, the court below noted that petitioners relied on Title VI of the 1964 Act, and stated that Title VI "requires affirmative action in which a person is 'excluded' from participation, 'denied' the benefits, and 'subjected' to discrimination" (A. 121). The court rejected petitioners' Title VI claim with the statement that "our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act" (A. 121). The court did not elaborate.

²⁰ Section 601 provides in full: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d.

The San Francisco schools receive federal financial assistance (e.g., A. 38-39). Conducting classes in English without making arrangements for the education of children who speak only the language of their non-English speaking national origin effectively denies those children an education. Thus, respondents' practices "exclude" petitioners "from participation in" respondents' educational programs; they "deny" petitioners "the benefits of" those programs; and they "subject" petitioners "to discrimination" in those programs. Therefore, the failure to teach petitioners English or otherwise to provide for their education violates Title VI.

Moreover, Title VI further provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U.S.C. § 2000d-1. Those rules, regulations and orders must be approved by the President. 42 U.S.C. § 2000d-1.

That is a clear grant of substantive rule-making power²¹ to effectuate Title VI in a manner that blends the objective of Title VI, nondiscrimination, with the "objectives of the statute authorizing the financial assistance"—e.g., in the case of the Elementary and Secondary Education Act, 20 U.S.C. § 241a et seq., to aid "local educational agencies to support adequate educational pro-

²¹ Compare *Public Utilities Commission of California v. United States*, 355 U.S. 534, 542 (1958) (regulations issued by Secretary of Army pursuant to power to "prescribe regulations to carry out his functions, powers and duties under this title" held to "have the force of law"); see also *Paul v. United States*, 371 U.S. 245, 255 (1963).

grams" and to meet "the special educational needs of educationally deprived children" (20 U.S.C. § 241a).

Pursuant to those provisions, the Department of Health, Education and Welfare has issued, and the President has approved, regulations that provide that in programs for support of elementary or secondary schools,

"discrimination by the recipient school district in any of its elementary or secondary schools . . . in the treatment of its students in any aspect of the educational process is prohibited. . . . [T]he prohibition of discrimination in the treatment of students . . . includes the prohibition of discrimination among the students . . . in the availability . . . of any academic . . . facilities of the grantee or other recipient." 45 C.F.R. § 80.5(b).

Those regulations have the "force of law."²² They are not simply an administrative "interpretation" of Title VI. Rather, they rest on the view of the Department and the President as to the appropriate way in which to "effectuate" the objective of Title VI, elimination of discrimination, while "achieving" the educational "objectives of the statute[s] authorizing . . . financial assistance" for public school systems. 42 U.S.C. § 2000d-1.

Conducting classes in English without making provision for non-English-speaking children denies those children an education and thus discriminates against "students in [an] aspect of the educational process" and discriminates "among the students . . . in the availability . . . of . . . academic . . . facilities . . ." (45 C.F.R. § 80.5(b)). Therefore, the failure to teach petitioners English or otherwise to provide for their education violates the regulations under Title VI.

That conclusion is confirmed by guidelines published by the Department to "clarify D/HEW policy on issues

²² See note 21, *supra*.

concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority group children deficient in English-language skills" (35 Fed. Reg. 11595). The guidelines explain the effect of the prohibition against discrimination on the responsibilities of public schools to children like the petitioners. The guidelines are based on findings by the Department that "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program," and that this has "the effect of denying equality of educational opportunity to . . . disadvantaged pupils from . . . national origin-minority groups" in violation of Title VI (35 Fed. Reg. 11595). Accordingly, the guidelines provide:

"Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11595.

The departmental guidelines, reflecting the Department's construction of the Act and the regulations, are "entitled to great weight."²³

Indeed, the administrative construction reflected in the guidelines is the only construction that gives the Act and the regulations any content when school authorities choose to provide programs from which non-English children

²³ *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *United States v. Jefferson County Bd. of Ed.*, 380 F.2d 385, 390 (5th Cir., 1967) (en banc); *Price v. Denison Independent School District Bd. of Ed.*, 348 F.2d 1010, 1013 (5th Cir., 1965); *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir., 1965); *Kemp v. Beasley*, 352 F.2d 14, 18-19 (8th Cir., 1965).

cannot benefit until they are taught English. Requiring affirmative steps to remedy language deficiencies when the inability to speak and understand English excludes children from education will minimize community resistance to the effective education of minority group children. "[S]ome of the most dramatic, wholesale failures of our public school systems occur among members of the language minorities. . . . What these conditions add up to is a conscious or unconscious policy of linguistic and cultural exclusion and alienation." Final Report of Select Committee on Equal Educational Opportunity, Toward Equal Educational Opportunity, S. Rep. No. 92-000, 92d Cong., 2d Sess. (1972), p. 277. Therefore, as the President has concluded, "School authorities must take appropriate action to overcome whatever language barriers might exist, in order to enable all students to participate equally in educational programs." Message on Busing and Equality of Educational Opportunities, Mar. 20, 1972, p. 8, H. Doc. No. 92-195, 92d Cong., 2d Sess. In short, the Department is right in its view that "to deny equal educational opportunity because of a child's language or heritage is as much a violation of law as to segregate children by race. . . ." U.S. Dept. HEW, HEW News, May 25, 1972, p. 1.²⁴

²⁴ In circumstances like these, affirmative steps to prevent facially neutral policies from having a sharply unequal impact on racial or ethnic minorities are frequently necessary and are required. *E.g.* *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir., 1968) ("'Equal protection of the laws' means more than merely the absence of governmental action designed to discriminate; . . . 'we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.'").

Moreover, respondents have applied for and have accepted funds under the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 241a; A. 38-39, 97-110). In order to obtain those funds, respondents are required to give express assurance that their programs "will be conducted . . . in compliance with all requirements imposed by *or pursuant to*" 45 C.F.R. Part 80 (45 C.F.R. § 80.4). Accordingly, respondents have expressly agreed, "in consideration of and for the purpose of obtaining any and all . . . Federal financial assistance," that they "will comply with Title VI . . . and all requirements imposed by *or pursuant to* . . . 45 C.F.R. Part 80. . . ." ²⁵ By seeking and accepting ESEA funds pursuant to those assurances, respondents have agreed, in light of the guidelines, to take steps to insure that petitioners' inability to speak and understand English does not exclude them from education. Respondents should be required to make good on that commitment.

²⁵ The agreement in this regard is set forth in HEW Form 441. The Form 441 executed by San Francisco is reproduced in the appendix to this brief.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

STEPHEN J. POLLAK
RALPH J. MOORE, JR.
FRANKLIN D. KRAMER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

Attorneys for Amici Curiae

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20036

*Attorney for Amicus National
Education Association*

PETER T. GALIANO
1705 Murchison Drive
Burlingame, Calif. 94010

*Attorney for Amicus California
Teachers Association*

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

UNITED STATES OF AMERICA*
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE

CERTIFICATION OF TRUE COPY

Pursuant to the provisions of Section 3505, Title 42, United States Code and the authority vested in me by the Secretary (35 F.R. 922), I hereby certify that the annexed are true copies of the documents on file in the Department of Health, Education, and Welfare.

IN WITN: S WHEREOF, I have hereunto set my hand and caused the seal of the Department of Health, Education, and Welfare to be affixed, on this 23rd day of July, 1973.

/s/ Doris F. Hoard
DORIS F. HOARD
Secretary to the Deputy General
Counsel

[SEAL]

* The certified copy of the documents reproduced in this appendix will be lodged with the Clerk of this Court.

**ASSURANCE OF COMPLIANCE WITH THE
DEPARTMENT OF HEALTH, EDUCATION, AND
WELFARE REGULATION UNDER TITLE VI OF
THE CIVIL RIGHTS ACT OF 1964**

SAN FRANCISCO UNITED SCHOOL DISTRICT (hereinafter called the "Applicant") HEREBY AGREES THAT it will comply with title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80) issued pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant by the Department, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during which the Federal financial assistance is extended to it by the Department.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant by the Department, including installment payments after such date on account of applications for Federal financial assistance which were approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated January 20, 1965

San Francisco Unified School District, Applicant

By /s/ Harold Mears
(President, Chairman of Board, or
comparable authorized official)

135 Van Ness Avenue
San Francisco, California
(Applicant's mailing address)

HEW-441

(12-64)

GPO 885-128

RECORD OF RECEIPT OF AND ACTION ON CIVIL RIGHTS ASSURANCES

**Division of School Assistance
in Federally Affected Areas**

SCHOOL DISTRICT (Legal name, city, county, State)	APPLICATION NUMBER	
San Francisco Unified School District	— E —	— C —
San Francisco	128	246
San Francisco County California		

- [X] 1. Receipt of HEW 441 dated _____ January 20, 1965
- [X] 2. HEW 441 determined acceptable
by SAFA _____ /s/ Ira C. Mason
(Signature)
- [X] 3. HEW 441 transmitted to EEOP
for files _____ February 8, 1965
(Date)
- [] 4A. Notification received from Equal Educational Opportunities Program that Assurance or Plan (shown below) has been accepted and the Federal payment may be released _____
(Date)

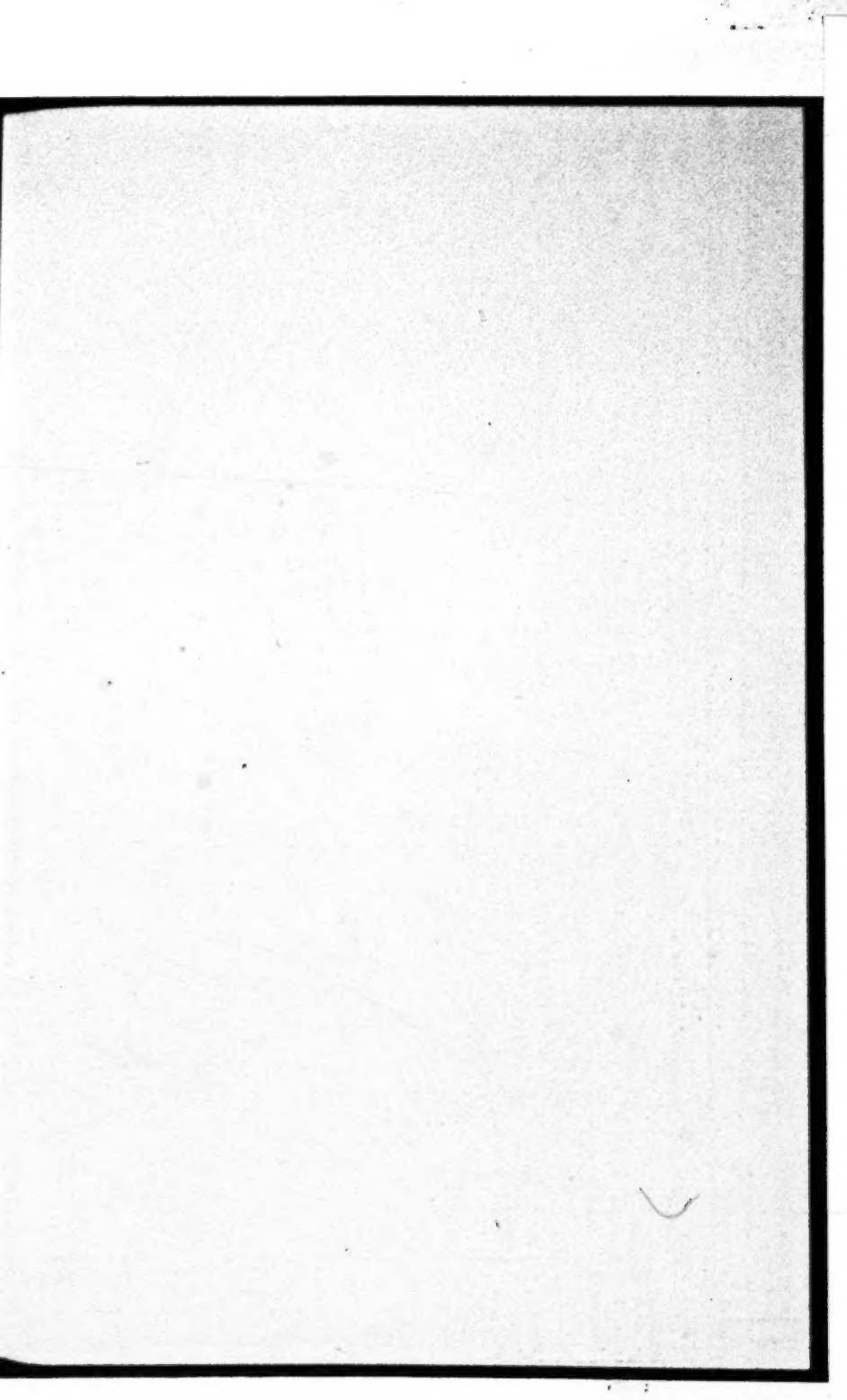
B. HEW 441	Court Order	Desegregation Plan
[]	[]	[]

C. Office of Education identification no. _____

Copy:

P.L. 815 file
P.L. 874 file
Financial folder
Statistical Record file

OE 4288 (1/65)



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In the Supreme Court

**OF THE
United States**

OCTOBER TERM 1972

No. 72-6520

**KINNEY KINMON LAU, a Minor by and through
MRS. KAM WAI LAU, his Guardian ad Litem,
et al., Petitioners,**

VS.

ALAN H. NICHOLS, et al., Respondents.

**On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF EFRAIN TOSTADO, ET AL.,
AS AMICI CURIAE**

INTEREST OF THE AMICI CURIAE

Amici are California children who speak and understand only Spanish. They are compelled by California law to attend school¹ and need an education to

¹Cal. Educ. Code §12101 (West 1969).

succeed in life. The classes they attend are conducted in English. As a result, although they sit for six hours a day in a school room, they are receiving no education. In an attempt to remedy this situation, *amici* have filed an action on behalf of themselves and others similarly situated, in the California Superior Court for Sacramento County,² in which they seek an order compelling the State of California and certain named school districts to provide them with an education. The Constitutional and Civil Rights Act questions presently before this Court in *Lau v. Nichols* are raised in the State Court action. Because the outcome of this case may have a substantial impact on the outcome of the case filed by *amici*, the interest of *amici* is self-evident.

**THE ISSUES TO BE COVERED IN THE
BRIEF BY AMICI CURIAE**

Amici have been advised that the legal issues involved herein will be exhaustively argued in the brief of Petitioners in *Lau v. Nichols* and in other *amicus curiae* briefs being filed. For this reason, *amici* herein will not burden the Court with a repetitive discussion on these arguments. Rather, *amici* file this brief to apprise the Court of the large number of Spanish speaking children³ in California who, because they

²*Tostado v. State Board of Education*, Civil No. 236988 (Cal. Superior Court for Sacramento County, filed July 23, 1973).

³The term "Spanish speaking" as used herein refers to those whose only language is Spanish. Most of these children are of Mexican ancestry.

cannot speak English, are not receiving an education, and, of the grave consequences resulting from their inability to obtain an education.

ARGUMENT

I.

DENIAL OF AN EDUCATION TO SPANISH SPEAKING CHILDREN IS AN EXTREMELY WIDESPREAD PRACTICE IN CALIFORNIA

Approximately four and one half million children attend school in the State of California.⁴ Sixteen percent, or approximately 725,000 of these children are Spanish surnamed children.⁵ Approximately eleven percent, or 80,000 of these children do not speak or understand English.⁶ The Los Angeles City Unified School District, alone, has in attendance 16,187 Spanish speaking children who do not speak English.⁷

⁴CAL. DEPT. OF EDUCATION REPORT, RACIAL AND ETHNIC DISTRIBUTION OF PUPILS IN CALIFORNIA PUBLIC SCHOOLS, Fall, 1971. app. Table I (1972).

⁵*Id.*

⁶This figure was obtained from reports submitted to the California Department of Education by school districts, pursuant to a legislatively required language census. Not all districts have reported, so the exact number of monolingual Spanish speaking students is not obtainable. However, a sample of 375 of the State's 1,054 districts showed attendance of 27,885 Spanish speaking children who do not speak English. At this rate, one could expect the number to be approximately 80,000 statewide. Dr. Gilbert Martinez, Director of the State Department of Education Task Force on Bilingual and Bicultural Education, indicates that this is an extremely conservative estimate. He has indicated that there are thirty to thirty-five thousand monolingual Spanish speaking children of migrant farm-workers alone.

⁷Language Census Survey Report of the Los Angeles Unified School District on file with the California Department of Education.

Amici recognize that not all of these children are being denied an education. A few districts are providing Spanish speaking children with an excellent education. For example, for the fiscal year 1969, 5,680 students were enrolled in bilingual programs financed under Title VII of the Elementary and Secondary Education Act.⁸ However, numerous Spanish speaking students receive no education. While approximately eleven percent of the Spanish surnamed students in California do not speak English, only 5.2 percent of these children receive any "English as a second language" instruction.⁹ Since the education, or lack thereof, being provided to *amici* herein is representative of that being provided to Spanish speaking children in most California school districts, a review of their situations is enlightening.

Efrain, Antonio and Alonzo Tostado are Mexican American children, aged 13, 11, and 8, respectively. They live and attend school in Salida, California. They speak only Spanish and cannot read, write, or understand English. Efrain Tostado is now in the seventh grade. He attends classes in mathematics, history, science, spelling, and physical education. However, none of his teachers is able to speak Spanish. There are no bilingual aides to help Efrain understand what is being taught. Efrain is unable to follow what goes on in the classes. He cannot understand what the teachers or the other students say

⁸U.S. CIVIL RIGHTS COMM'N REPORT, THE EXCLUDED STUDENT, p. 23 (1972).

⁹*Id.* at p. 26.

during the class. The teachers do not give him assignments or homework. They do not call on him. They do not help him.

Efrain has been given some books written in Spanish to read during class. These books are not the same as those used by the other students, i.e. they are not translations of assigned textbooks. Rather, they are just some books in Spanish which the school happened to have around. Efrain reads from these books to the best of his ability, but he does not know many of the words even in Spanish and does not fully understand what he reads. No one supervises any of this reading. He is not given specific assignments in connection with these books. On occasion, Efrain has on his own initiative tried to write papers about what he reads. Since the papers are written in Spanish and since no one on the faculty of Salida Elementary School can read Spanish, these papers have been returned to Efrain without comment.

The only attempt to include Efrain in the educational process is trivial and ineffective. Twice each week, for half an hour, Efrain is pulled out of a regular class and taken to the nurse's room with some other children. The children are given headphones and hear words in English. They try to repeat these words. Efrain does not know the meaning of the words he hears and does not know whether he is repeating them correctly.

Efrain is eager to learn. Before moving to Salida, he lived for four weeks in Santa Barbara, California. While in school there, he enthusiastically participated

in a bilingual program, with classes conducted in both English and Spanish. Efrain, himself, describes the school in Santa Barbara as a place where he understood what was going on and felt he was learning. In Salida, however, Efrain's schooling amounts to no more than his physical presence in the classroom. The school has no program of instruction which is in any way directed toward Efrain's special needs, and he is wholly excluded from the regular program of instruction.

Efrain's brother, Antonio, is in the fifth grade at Salida Elementary School. His teacher cannot speak or understand Spanish, and there are no bilingual aides to help Antonio with the work. As a result, Antonio does not even know what subjects are being taught in the classroom in which he sits. Sometimes the teacher dictates words in English, and the children write down the words as they hear them. Antonio does not understand what he is writing. His papers are always marked wrong, but he is not told how to do them correctly. Other students are given homework assignments, but Antonio is not. As with Efrain, Antonio is physically present at a school but is effectively excluded from participating in the regular program and receives no special help.

Alonzo Tostado is in the second grade at Salida Elementary School. He has always liked school and is eager to learn. In schools he previously attended in Mexico and in Santa Barbara, Alonzo participated in class and learned readily. In Salida Elementary School, Alonzo goes to class, but he cannot partici-

pate and does not learn. His teacher cannot speak Spanish. There are no bilingual aides. Alonzo hears the teacher talk to other children, but does not know what is being said. He tries to copy what other students do, but he finds this frustrating since he does not know what he is doing. The schools only attempt to help Alonzo is to provide him for half an hour each morning with a "tutor"—a boy from the seventh grade. This boy, however, speaks no Spanish and is unable to help Alonzo in any way.

The Salida Union School District consists of a single elementary school with students in grades kindergarten through eighth. The school has a current enrollment of approximately 533 students of whom 28.5 percent, or 152, are Spanish surnamed. The mother tongue of nearly all these students is Spanish. While some of these students are able to function in the English language, many speak little or no English. Not one teacher in the school speaks Spanish. The school has one receptionist. She does not speak Spanish. The school employs four Title I aides, none of whom speak Spanish. The school does not have a bilingual program, and does not provide any program of English as a Second Language for the Mexican American students who have difficulty speaking and understanding English.

Manuel Garcia is eight years old. He attends school in the Riverbank Elementary School District. He neither speaks nor understands English. His teacher speaks no Spanish. Manuel attends school for approximately five hours a day or 25 hours a week. The only

educational benefit he obtains from these 25 hours consist of thrice-weekly half hour classes with a bilingual aide. However, these classes do not parallel the normal course of study, and, no real attempt is made to assist Manuel in the subject matter areas in which the other students are instructed during the regular class. Rather, the aide reads the children stories in English and Spanish and sometimes has them play games. For the remaining $23\frac{1}{2}$ hours each week, Manuel sits in a classroom, unable to understand what his teacher is saying and unable to ask questions. As a result, he has fallen further and further behind in mathematics, reading, spelling, writing and other subjects he should be learning.

Manuel is eight years old, yet he is still in the first grade. He has been in the first grade for three years now. Having Manuel Garcia sit day after day in a first grade classroom may satisfy the State truancy laws but it does not provide him with any education.

The Riverbank Elementary School District has 1,295 students, 31% of which are Mexican American. The mother tongue of most of these children is Spanish. The District's sole attempt to provide any instruction in English as a second language, is through a Public Employment Program non-certificated bilingual aide who is there to help 35 children. This is the individual who provides Manuel Garcia with his thrice-weekly bilingual instruction. The funds for this aide are provided through Title VI of the Economic Opportunity Act, and expired at the end of the last

fiscal year. As a result, even this meager effort will no longer occur next school year.

Arturo Alcala is five years old. He lives in Windsor, California. He speaks no English. In January, 1973, his mother and a Sonoma County social worker attempted to enroll him in kindergarten in the Windsor Union Elementary School District. They were advised by the District personnel that, because he does not speak English, the school was unable to provide him with the instruction he needed and that they would not enroll him in kindergarten.

Arturo will try again this fall to attend school in Windsor. However, since the district provides no bilingual or English as a second language instruction, he will sit in a class but will not receive an education.

The Windsor Union Elementary School District has 790 students; 36 percent have Spanish surnames. The mother tongue of most of these children is Spanish, the only provision the district makes for educating non-English speaking children is through bilingual teacher's aides. However, because of the great need and the few bilingual aides employed, non-English speaking children receive only about 20 minutes a day help from an aide. The children spend the remainder of the day sitting in a classroom but not understanding what is going on.

The lack of education being provided to *amici* herein, unfortunately appears to be the rule rather than the exception in California. The result is that

thousands of Spanish speaking children are mandated to attend school, but are not being provided with an education.

In *San Antonio Independent School District v. Rodriguez*, 41 U.S.L.W. 4407, 4416 (1973), this Court reiterated the often expressed view that "education is perhaps the most important function of state and local government." In upholding the Texas school financing system, the Court stressed that it was not faced with a situation wherein a group of persons "sustained absolute deprivation of a meaningful opportunity to enjoy . . . [a desired] benefit." With the Chinese children in *Lau*, and the Spanish speaking children in *Tostado*, the Court is faced with an absolute deprivation. As Judge Hufstедler said in her dissent to the rejection of a motion for *en banc* consideration of *Lau v. Nichols*, ___ F.2d ___ (9th Cir. Civil No. 26,155, June 18, 1973): "Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it."

II.

DENIAL OF AN EDUCATION TO SPANISH SPEAKING CHILDREN CAUSES SERIOUS ECONOMIC AND SOCIAL HARM

A. There is a Close Correlation Between Educational Level, Income, and Receipt of Public Assistance.

This Court, in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) stated that "... it is doubtful that any child may reasonably be expected to succeed

in life if he is denied the opportunity of an education." In the very recent *San Antonio* case, the Court reiterated this view, stating that it "had lost none of its vitality with the passage of time." *San Antonio Independent School District v. Rodriguez*, 41 U.S.L.W. 4407, 4416 (1973). The United States Census data concerning the identity of welfare recipients and those living below the poverty level, confirms the validity of the Court's statement. The close correlation between education obtained and receipt of welfare, poverty and income levels is demonstrated in Table I.

TABLE I
EDUCATION AND ECONOMIC CHARACTERISTICS FOR
PLACES IN CALIFORNIA WITH POPULATION
OF 10,000 TO 50,000

Place	Median School Years Completed by Males Over 25 Years of Age	Percentage of Families Re- ceiving Public Assistance	Percentage of Families Living Below the Poverty Level	Median Family Income
Los Altos	16.0	2.1%	3.0%	\$18,208
Moraga	16.4	1.0%	3.6%	19,615
Palos Verdes	16.6	1.4%	0.7%	23,760
Chino	12.0	7.7%	8.3%	10,356
Fontana	12.0	8.7%	9.4%	9,757
W. Sac.	12.0	9.4%	10.8%	9,406
Calverico	8.6	17.1%	25.2%	6,869
Delano	9.0	17.0%	14.5%	7,138
Sanger	8.9	16.2%	16.1%	7,158

¹⁰U.S. DEPT. OF COMMERCE REPORT, UNITED STATES CENSUS OF POPULATION 1970, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, CALIFORNIA, Table 103 (1972).

¹¹*Id.* at Table 107.

¹²*Id.*

¹³*Id.*

It is clear from Table I that, on the average, the more education a person obtains, the greater will be his income. It is likewise clear that the less education a person obtains, the greater will be the likelihood that his family will be living below the poverty level and that he will have to rely upon public assistance to provide for his family. Because the ability to obtain such basic necessities as housing, clothing, and food is dependent upon education, education becomes the key to not only one's standard of living but to survival itself. In addition to the economic harm resulting from lack of an education, there are serious social consequences. As this Court recognized in *Brown v. Board of Education, supra*, 347 U.S. 483, 493:

Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

- B. The Spanish Surnamed Population in California Has a Significantly Lower Educational Level and Lower Income Level and a Significantly Higher Percentage of Persons Living Below the Poverty Level and Receiving Public Assistance Than the State Population at Large.**

There is no data available on the characteristics set out in Table I specifically for persons who do not speak English. However, there is abundant data on "persons of Spanish language or Spanish surname."¹⁴ Since 69.3% of all Spanish surnamed persons speak Spanish as their mother tongue,¹⁵ the statistics on education and income level for persons of Spanish language or Spanish surname are indicative of those factors for Spanish speaking persons. Table II shows a comparison of the educational level of persons of Spanish language or Spanish surname with total statewide population:

¹⁴United States census data is reported for "persons of Spanish language or of Spanish surname." This includes persons of Spanish mother tongue, persons in families which the head or wife reported Spanish as his or her mother tongue and persons with a surname listed on the Immigration and Naturalization Service list of Spanish surnames. U.S. DEPT. OF COMMERCE REPORT, UNITED STATES CENSUS OF POPULATION 1970, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, CALIFORNIA, app. A, p. App-7 (1972).

¹⁵*Id.* at Table 49.

TABLE II.
STATEWIDE EDUCATION CHARACTERISTICS¹

	Median School Years Completed for Persons 25 Years or Older	Percent of Persons 25 Years or Older Who Have Completed 4 Years of High School	Percent of Persons 25 Years or Older Who Have Completed 4 Years of College
General Population	12.4	62.6	13.4
Spanish Language or Spanish Surname	10.6	40.9	5.7

Table II shows that:

(1) Persons of Spanish language or Spanish surname obtain almost two years less education than the statewide average;

(2) The percentage of persons of Spanish language or Spanish surname who complete 4 years of high school is only two-thirds that of the statewide average; and

(3) The percentage of persons of Spanish language or Spanish surname who have completed 4 years of college is less than one-half the statewide average.

¹Id. at Table 51.

Table III shows a comparison of the economic characteristics for the same groups:

TABLE III
STATEWIDE ECONOMIC CHARACTERISTICS

	Percentage of 17 Families Receiving Public Assistance	Percentage of 18 Families Living Below the Poverty Level	Median Income ¹⁹ for Families
General Population	7.9	8.4	\$10,732
Spanish Language or Spanish Surname	13.1	14.0	8,791

It is clear from Table III that the lower education level of persons of Spanish language or Spanish surname results in lower income, greater reliance upon public assistance, and greater numbers living below the poverty level.

- C. The Disparity Between the Spanish Surnamed Population and the General Population in Education and Economic Characteristics is Not as Much the Result of a Person Having a Spanish Surname as the Result of Spanish as His Mother Tongue.

The data set out in Tables II and III become of far greater relevance to the issue before the Court when the class of persons designated "Spanish language or Spanish surname" is broken down into the sub-classes, persons whose mother tongue is Spanish and persons whose mother tongue is English. As already indicated, 69.3 percent of the "persons of Spanish language or Spanish surname" speak Span-

¹⁷*Id.* at Table 57.

¹⁸*Id.* at Table 58.

¹⁹*Id.* at Table 57.

ish as their mother tongue. By looking to specific areas within the State wherein the percentage of persons with Spanish as their mother tongue is significantly above or below this level, and comparing the education and economic data of these areas, it becomes clear that the disparities shown in Tables II and III are not as much the result of a person having a Spanish surname as they are the result of Spanish being his mother tongue.

TABLE IV
MOTHER TONGUE, EDUCATION AND ECONOMIC CHARACTERISTICS
OF PERSONS OF SPANISH LANGUAGE OR SPANISH SURNAME

Places with population 10,000-50,000	Percentage of persons of Spanish language or Spanish surname whose mother's tongue is Spanish	Percentage of males 25 years old and over who are High School graduates ¹	Median School Years completed by males 25 years old or over ²	Percentage of Families receiving public assistance ³	Percentage of Families with income below poverty levels ⁴	Median annual income for families ⁵
Palos Verdes Peninsula	5%	83%	15.2	1.1%	1.8%	\$18,103
Castro Valley	25%	52%	12.1	8.3%	3.5%	13,017
Alamo-Danville	27.5%	74%	12.6	3.6%	3.0%	18,676
San Carlos	31%	78%	12.8	4.9%	6.9%	14,057
Carmichael	37%	86%	13.0	4.8%	4.8%	12,419
Dublin	38%	78%	12.7	8.1%	6.0%	11,492
Azusa	84%	28%	9.4	11.5%	10.7%	8,419
Huntington Park	85%	34%	9.5	16.7%	14.4%	7,600
Santa Paula	86%	24%	8.5	10.6%	20.3%	7,384
Madera	87%	22%	8.2	27.3%	29.3%	5,854
Indio	87%	21%	8.4	16.9%	13.1%	7,679
Willowbrook	89%	17%	7.9	23.2%	22.7%	6,644
Brawley	91%	23%	8.0	24.1%	26.2%	6,634
Calexico	97%	29%	7.9	20.9%	30.6%	6,440

See next page for footnotes.

TABLE IV (continued)

MOTHER TONGUE, EDUCATION AND ECONOMIC CHARACTERISTICS
OF PERSONS OF SPANISH LANGUAGE OR SPANISH SURNAME

Places with population over 50,000	Percentage of persons of Spanish language or Spanish surname whose mother tongue is Spanish ²⁰	Percentage of males 25 years old and over who are High School graduates ²¹	Median School Years completed by males 25 years old or over ²²	Percentage of Families receiving public assistance ²³	Percentage of Families with income below poverty level ²⁴	Median annual income for families
Torrance	55%	68%	12.6	6.2%	4.9%	11,952
Lakewood	57%	59%	12.3	8.0%	5.2%	11,405
San Francisco	63%	54%	12.1	11.8%	11.8%	9,403
El Monte	78%	32%	9.9	16.6%	15.4%	8,093
Fresno	81%	26%	8.2	23.9%	29.3%	6,924
East Los Angeles	90%	24%	8.4	20.0%	18.7%	7,367

Tables II and III showed that "persons of Spanish language or Spanish surname" receive less education, are more likely to live below the poverty level and are more likely to need public assistance than persons within the general population. Table IV

²⁰The percentage of persons of Spanish language or Spanish surnames whose mother tongue is Spanish was derived by dividing the total population of persons of Spanish language or Spanish surname provided in Table 107, of the Census Report, into the total population which speaks Spanish as its mother tongue, provided in Table 102.

²¹U.S. Dept. of Commerce Report, United States Census of Population 1970, General Social and Economic Characteristics, California Table 113 (1972).

²²*Id.*

²³*Id.* at Table 116.

²⁴*Id.*

²⁵*Id.*

clearly demonstrates that the significant factor which results in the disparity between "persons of Spanish language or Spanish surname" and the general population is Spanish as a mother tongue. In Palos Verdes Peninsula, where only five percent of the Spanish surnamed population speaks Spanish as their mother tongue, the average family income is \$18,103. In Calerico, where 97 percent of the Spanish surnamed population speaks Spanish as their mother tongue, the average family income is \$6,440. Throughout the table, the close correlation between the percent of Spanish surnamed persons who speak Spanish as their mother tongue and their family income is evident.

This close correlation is seen in each of the education and economic characteristics listed. In San Carlos, where only 3 percent of the Spanish surnamed persons speak Spanish as their mother tongue, 78 percent of the Spanish surnamed persons graduate from high school and their median educational level is 12.8 years. In Willowbrook, where 89 percent of the Spanish surnamed speak Spanish as their mother tongue, only 17 percent graduate from high school and the median educational level is 7.9 years. In Brawley, where 91 percent of the Spanish surnamed persons speak Spanish as their mother tongue, the percentage of Spanish surnamed families which receive public assistance is (24.9) seven times that of the Spanish surnamed families in Alamo-Danville (3.6%), where only 27.5% of the Spanish surnamed persons speak Spanish as their mother tongue. In Madera, where 87% of the

Spanish surnamed population speak Spanish as their mother tongue, the percentage of families living below the poverty level is (29.3%) six times that of Carmichael (4.8%), where only 37% of the Spanish surnamed persons speak Spanish as their mother tongue.

Table IV makes abundantly clear that a Spanish surnamed person's chances of obtaining an education sufficient to provide him with the opportunity to achieve economic independence depends to a significant extent upon whether his mother tongue is English or Spanish. Fortunately, the fact that a child's mother tongue is Spanish does not mean that he cannot learn English. However, since Spanish is spoken in his home, if he is to learn English, it must occur in school.²⁶ When he is placed in a classroom where only English is spoken, he may eventually pick up a few words, but will in the meantime fall far behind his English-

²⁶Since the number of Spanish speaking children attending school in California and the Southwest is great, the question of additional cost to provide them with an education is perhaps relevant. In fiscal year 1969, the Department of Health, Education and Welfare expended \$4,986,056 for bilingual programs attended by 18,677 children, or, an average of \$267 per child. U.S. Comm. on Civil Rights Report, *The Excluded Student*, p. 23 (1972). This sum represents expenditures for teachers, teacher training, and materials. To determine the additional cost to educate a child in a bilingual program, the amount which would have been spent on the child to educate him in a regular class must be deducted from the cost to educate him in the bilingual class. Since a bilingual teacher and bilingual materials should cost the district no more than a monolingual teacher and monolingual materials, the difference in cost should be limited to teacher training. In light of the cost to society resulting from the inability of Spanish speaking persons to obtain an education, the failure of school districts to provide Spanish speaking children with bilingual education is irrational.

speaking classmates,²⁷ will likely be placed in a class for the mentally retarded,²⁸ and the chances that he will drop out of school before graduating are high.²⁹

The only means by which approximately 83,000 monolingual Spanish speaking children in California's public schools can obtain an education and thereby move into the mainstream of American life, free of poverty and the need for public assistance, is to be taught English. Whether this is done in bilingual classes, English as a second language classes, through the use of teacher aides or other persons, is not a problem with which this Court need be concerned. On the other hand, to compel a monolingual Spanish

²⁷That this is occurring is clear from a comparison of Anglo and Mexican American children's reading achievement, grade repetitions, and numbers of average children in the schools. In May 1972, the United States Commission on Civil Rights reported that in California, 52 percent of the Mexican American fourth grade children read below grade level, compared to 27 percent for Anglo children. By the time these children graduate from high school, 63 percent of the Mexican American children read below grade level. Nearly 22 percent are reading at the ninth grade level or lower. The Commission points out that the problem is heightened by the fact that an estimated 36 percent of the Mexican American children have dropped out of school before reaching the 12th grade, U.S. COMMISSION ON CIVIL RIGHTS REPORT, THE UNFINISHED EDUCATION, p. 27-28 (1971). The Commission also reported that in the Southwest, 15.9 percent of the Mexican American students repeat the first grade, compared with six percent for Anglo students. In California, the figures are 9.8 percent and 5.6 percent, respectively. *Id.* at p. 35. The Commission found that by grade one, 3.9 percent of the Mexican American students are two or more years below average, compared with .8 percent of the Anglo students. By grade eight, 9.4 percent of the Mexican American students are two or more years below average, compared with 1.2 percent of the Anglo students. *Id.* at p. 35.

²⁸See Complaint, exhibits and stipulated order in *Diana v. State Board of Education*, Civil No. C-70 34 RFP (N.D. Cal. 1970).

²⁹See U.S. COMMISSION ON CIVIL RIGHTS REPORT, THE UNFINISHED EDUCATION, pp. 12-14 (1971).

speaking child to sit all day, every day, in a class being taught solely in English, is to impose upon him a life sentence of poverty for the crime of being unable to speak English.

CONCLUSION

For the above stated reasons, the judgment below should be reversed.

Dated, July 20, 1973.

Respectfully submitted,

MARTIN GLICK,

MAURICE JOURDANE,

California Rural Legal Assistance,

MICHAEL REISS,

California Rural Legal Assistance,

Attorneys for Amici Curiae.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU, et al.,

Petitioners,

vs.

ALAN H. NICHOLS, et al.,

Respondents.

BRIEF OF AMICI CURIAE

The Chinese Consolidated Benevolent Association, The Chinese American Citizens Alliance, The Chinese Chamber of Commerce, The Chinese for Affirmative Action, The Chinatown/North Beach District Council, The Chinatown/North Beach Area Youth Council, The Chinese Newcomers Service Center, The Chinatown/North Beach Family Planning Educational Services, The Association of Chinese Teachers, Donaldina Cameron House, Mr. William J. Chow, Mr. Paul S. Fong, and Mr. Henry S. Tom, in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

All parties have consented to the filing of this brief on behalf of the Chinese Consolidated Benevolent Association, the Chinese American Citizens Alliance, the Chinese Chamber of Commerce, the Chinese for Affirmative Action, the Chinatown/North Beach Dis-

trict Council, the Chinatown/North Beach Area Youth Council, the Chinese Newcomers Service Center, the Chinatown/North Beach Family Planning Educational Services, The Association of Chinese Teachers, Donaldina Cameron House, Mr. William J. Chow, Mr. Paul S. Fong, and Mr. Henry S. Tom as amici curiae in support of the writ of certiorari to the United States Court of Appeals for the Ninth Circuit.¹

INTEREST OF AMICI

The Chinese Consolidated Benevolent Association (commonly known as the Chinese Six Companies) is the leading and most prominent Chinese organization in the United States. The Chinese Six Companies is the parent organization of the associations from the seven large districts which make up Southern China; more than 90 percent of the Chinese persons in the United States descend from one of these seven districts. Besides dealing with the myriad educational, social, and economic problems that confront the Chinatown area of San Francisco, the Association also acts as an official liaison between the Chinatown area and other elements of the San Francisco community.

The Chinese American Citizens Alliance [CACA] is a national organization established 63 years ago to provide a network of communication between the various Chinese-American communities in the United

¹The consent of both the petitioners and the respondents are being filed with the Clerk of the Court in accordance with Rule 42(2) of the Rules of this Court.

States. CACA has played a prominent role in getting amendments to the United States Immigration and Nationality Act which have relaxed the restrictions placed on Chinese seeking to immigrate to this country. *E.g.*, 8 U.S.C. §§1152, 1153 (1965).

The Chinese Chamber of Commerce represents the business interests of San Francisco's Chinatown area. The Chamber of Commerce both develops and promotes economic activities which involve thousands of non-English-speaking Chinese workers. Moreover, over the years, the Chinese Chamber of Commerce has expanded its activities and now serves as a service organization for the entire Chinatown community. The Chamber of Commerce also plays a large role in sponsoring numerous cultural events in the Chinatown area.

Chinese for Affirmative Action [CAA] is an organization dedicated to defending the civil rights of the Chinese community in the United States. Based in San Francisco, CAA is actively engaged in securing health, education, welfare, manpower training, and economic services to meet the needs of Chinese communities. It has negotiated jobs for Chinese in both private and public employment sectors and has initiated many English and Chinese-language cultural programs on radio and television. CAA has also designed and promoted affirmative action plans for various businesses, unions, and government agencies for the employment of Chinese individuals and has attempted to implement such programs in the San Francisco Unified School District.

The Chinatown/North Beach District Council is composed of professional and lay individuals who provide social services information to the San Francisco Chinatown community. Formed in 1960, the purpose of the District Council is to develop and implement comprehensive education, health, cultural, employment, youth, and senior citizens programs. Besides implementing its own programs, the District Council organizes and coordinates the efforts of other concerned agencies and individuals in Chinatown.

The Chinatown/North Beach Area Youth Council was founded in 1968 with the support of various youth-serving agencies and organizations in San Francisco. The Council was formed to effectively articulate the needs of the youth of the Chinatown area—many of who are non-English-speaking—and to plan, develop, and carry out effective programs in the areas of employment, education, and recreation for these youth. Many of these programs are geared directly at the English-language deficiencies of young Chinese individuals.

The Chinese Newcomers Service Center was founded in 1969 by residents of San Francisco's Chinatown interested in the welfare of immigrants and other non-English-speaking Chinese individuals. The Center serves as an information and referral center for Chinatown residents who are unable to avail themselves of both public and private services because of language and cultural barriers. The Center provides a 24-hour telephone service ("Chinatown Exchange"), a Drop-In Service, and a Home Visiting Program.

The Center also works closely with the International Social Service of Hong Kong, which provides pre-migration counseling and services to prospective immigrants.

The Chinatown/North Beach Family Educational Services was established under the auspices of the United States Department of Health, Education and Welfare to offer educational and informational services on family planning, birth-control methods, venereal disease, and cancer signals. Much of its work is done with non-English-speaking residents of San Francisco's Chinatown area.

The Association of Chinese Teachers [TACT] is a non-profit professional association of teachers who volunteer their services to improve the quality of education in the Chinatown area of San Francisco. TACT has planned numerous programs to meet the English-language disabilities of Chinese-speaking children. Many of these programs have been formally submitted to the San Francisco Unified School District.

The Donaldina Cameron House of Chinatown is a community center sponsored by the United Presbyterian Church. It has offered youth and social case-work services to families and individuals in San Francisco's Chinatown area since 1873; many of these services aim at overcoming the problems faced by non-English-speaking Chinese residents of San Francisco. The Donaldina Cameron House also offers recreation and craft activities; child and adult guidance programs; and community organization services.

William J. Chow is the president of the San Francisco Civil Service Commission. He has been a practicing attorney in San Francisco's Chinatown area for over 30 years and formerly served as chairman of the San Francisco Housing Authority and as a member of the San Francisco Parking Authority. Mr. Chow is also a former president of the Chinese Consolidated Benevolent Association (commonly known as the Chinese Six Companies), which is also an amicus in the instant brief.

Paul S. Fong was born and raised in San Francisco's Chinatown and is presently a practicing attorney there. He has worked extensively with impoverished non-English-speaking youths as a parole agent for the California Youth Authority assigned to Chinatown. He is also a member of the board of directors of the Chinatown/North Beach Youth Service and Coordinating Center, a delinquency prevention program in Chinatown sponsored by the California Council on Criminal Justice.

Henry S. Tom is the executive director of the Chinatown Branch of the Young Men's Christian Association. He has been an administrator in the Chinatown area for more than 20 years and has pioneered the YMCA's Educational-Special Help Program.

DISCUSSION

PETITIONERS' LACK OF ANY ENGLISH-LANGUAGE SKILLS NOT ONLY TOTALLY EXCLUDES THEM FROM EQUAL EDUCATIONAL OPPORTUNITIES, BUT DRAMATICALLY CONTRIBUTES TO THE POVERTY, DELINQUENCY, AND EMPLOYMENT PROBLEMS IN SAN FRANCISCO'S CHINATOWN.

The failure of the San Francisco Unified School District to provide compensatory English Instruction to non-English-speaking Chinese students is a patent denial of these students' rights to equal educational opportunities which are now received only by English-speaking students. The Chinese-speaking children who are denied these rights include not only immigrants to the United States, but also those non-English-speaking children who were born and raised in San Francisco's Chinatown area.

San Francisco encompasses the largest Chinese community in the United States. In fact, it is the largest outside the Orient itself.² The Chinese population in San Francisco began to increase after World War II when most of California's anti-Chinese laws were repealed and federal immigration statutes were modified.³ The influx of Chinese immigrants during the past few decades naturally included children who lacked any knowledge of English.⁴ However, the same lack of knowledge of English is equally present

²The 1970 United States Census shows there are 58,696 Chinese people in San Francisco. This constitutes 8.2 percent of the total San Francisco population. U.S. Dept. of Commerce, *1970 Census Population and Housing: Census Tracts: San Francisco-Oakland, Calif. Standard Metropolitan Statistical Area*, PHC(1)-189 (1972).

³*E.g.*, Immigration and Nationality Act §§ 202, 203, 8 U.S.C. §§ 1152, 1153 (1965).

⁴San Francisco Unified School District, "Educational Equality/Quality," Report #2, 25 (1969).

among tens of thousands of American-born Chinese-speaking children.⁶ Not surprisingly, the San Francisco Unified School District has conceded that none of its existing programs can overcome the English language barriers faced by all Chinese speaking children, whether American-born or not.⁷

The educational deprivations suffered by these non-English-speaking Chinese children have been analyzed in many reports. A citizens' study committee of the Bay Area Social Planning Council was formed in 1969 to study the problems of Chinese residents of San Francisco. The Planning Council's Committee, headed by California Supreme Court Justice Stanley Mosk and San Francisco Municipal Court Judge Harry W. Low, concluded that "... existing efforts to provide English language instruction to Chinese-speaking students are inadequate."⁸ Similarly, another study of Chinese residents in San Francisco emphasized the failure of the San Francisco Unified School District to deal with the language dilemma confronting non-English-speaking Chinese students.⁹

The findings of these studies are supported by Allen Tucker, education coordinator of San Francisco's Chinatown-North Beach English Language Center,

⁶It is thus more than just coincidental that five of the named petitioners in this action—David Leong, David Sun, Judy Sun, Joan Yee, and Karen Yee—are American-born citizens of the United States.

⁷San Francisco Unified School District, "Pilot Program: Chinese Bilingual" 3A, 6A (May 5, 1969), Plaintiffs' Exhibit No. 5 (App. —).

⁸Bay Area Social Planning Council, "San Francisco Chinese Community Citizens' Survey & Fact Finding Committee Report" 11 (1969).

⁹*San Francisco Chronicle*, 2 (Feb. 24, 1971).

who has conducted research on the feelings of inferiority in Chinese students that stem from English-language barriers.

In the classroom [non-English-speaking Chinese students] are often unable to understand what is said by the teacher or by another student. They appear to be unduly passive and unwilling to interact or participate. It is not so much a matter of unwillingness as of inability because of their failure to understand instructions, directions, or the purpose of a classroom activity. Isolated behind their language barriers they become discouraged, withdrawn, and begin to accept failure as unavoidable.⁹

The obstacles facing a non-English-speaking Chinese student do not end in the classroom but place a further burden on the student that affects his entire life. One's confidence and success in using and receiving both public and private services often depend on one's ability to communicate effectively in English. For example, severe community-police problems result from such difficulties. Those problems were recently described in the testimony of San Francisco Police Officer Donald Tong before the California Fair Employment Practices Commission:

For the past three years, during my assignment with the Community Relations Unit as liason to the Chinatown Community, I have seen many police relations problems and frustrations of people living in Chinatown. Most problems and frustrations arise because policemen are unable

⁹Integrated Education Associates, *Chinese Americans: School and Community Problems* 45 (1972).

to explain their activities and behavior to Chinese residents and vice-versa. The officers assigned to the community do not speak Cantonese, and many of the Chinese residents do not speak English. There is no common ground for effective communication.¹⁰

In a survey conducted in 1970 by the Bay Area Social Planning Council, the major non-educational problems affecting Chinese residents of San Francisco were identified as impoverished conditions, juvenile delinquency, and employment barriers.¹¹ Each of these problems has a direct nexus to the English-language barriers which are perpetuated by the San Francisco Unified School District's exclusion of Chinese-speaking children from equal education opportunities.

The most important myth dispelled by this and other studies is the widely-held assumption that the Chinese, at least in America, take care of their own. From this, it is assumed that all Chinese receive the necessary assistance within their own ethnic community and in time move up the socio-economic scale.¹² The facts, however, show the gross impoverished conditions endured by a large percentage of Chinese residents in San Francisco. Based on 1970 United States Census information, approximately 30 percent of the Chinese in the Chinatown area of

¹⁰Testimony of Donald Tong, San Francisco Police Officer, before the California Fair Employment Practice Commission (December 1970).

¹¹Bay Area Social Planning Council, "1970 Chinese Staff Analysis" 20 (1971).

¹²E.g., S. Perry, *The Chinese Poor in America* 3 (1968).

San Francisco live below the poverty level set by the federal government (as compared to 9.8 percent of all San Francisco residents). Moreover, the median income of families in Chinatown is barely half that of all San Francisco families.¹³ It is thus not surprising that San Francisco's Chinatown is officially designated as a poverty target area by the Office of Economic Opportunity of the United States.

Directly related to these severe poverty conditions is the problem of juvenile delinquency in San Francisco's Chinatown. The inability to speak English is the difficulty most frequently expressed by youths in Chinatown.¹⁴ Faced with a school system that is unwilling to provide them any English-language skills and viewing college as an impossible dream for that reason, these students swell the dropout statistics in San Francisco.¹⁵ Lacking a high school diploma and confined to Chinatown because of their English-language problems, the youth turn to street gangs:

The Chinese street kids are almost all young men of high school age or older. Many of these youth come from very poor or unstable backgrounds and have few language skills. In high school they sit in the back of the classroom not knowing what is going on because the teacher is speaking rapidly in a foreign language, English.

¹³U.S. Dept. of Commerce, *1970 Census Population and Housing: Census Tracts: San Francisco-Oakland, Calif. Standard Metropolitan Statistical Area*, PHC(1)-189 (1972).

¹⁴Bay Area Social Planning Council, "1970 Chinese Staff Analysis" 18 (1971).

¹⁵See, e.g., San Francisco Unified School District, "Pilot Program: Chinese Bilingual" 6A (May 5, 1969), Plaintiffs' Exhibit No. 5 (App. —).

The teacher asks them questions, they cannot answer, and they are classified dumb. Facing insurmountable problems they give up, cut classes and hang around pool halls, bars or street corners. In the street, life is infinitely more exciting than in the boring classroom. Here they can communicate with friends in their native language. There is more communication here among Chinese-speaking friends than in the public classroom where English language teaching frustrates their innate talents and abilities.¹⁶

Until equal access to the educational system is provided, the non-English-speaking student of today will be caught in this same quandary.

Finally, the inevitable isolation of non-English-speaking Chinese students from the economic and social process in San Francisco is reflected in the pattern of employment of Chinatown residents. The mobile resident, who is apt to be fluent in English, can move out of Chinatown and into the mainstream of the American economic system—into technical, professional, and managerial positions. Those lacking knowledge of English, however, do not have the same opportunities. For example, among residents of San Francisco's Chinatown, less than 10 percent of those over age 16 and employed are classified managerial or professional, as compared to 25 percent in San Francisco as a whole.¹⁷ The failure of the San Francisco Unified School District to redress the language dis-

¹⁶J. Leong, "Hong Kong Immigrants and the Public Schools", in *Asian American Review* 34 (Spring 1972).

¹⁷See note 13, *supra*.

crimination faced by non-English-speaking Chinese students serves to exacerbate this disparity.

CONCLUSION

Studies and surveys have documented the long-known fact that the San Francisco Unified School District has failed—and continues to fail—to afford non-English-speaking Chinese students any access to an education. It is clearly a fictional hope to believe that by supplying all students the same books, materials, facilities, and programs, the educational system is equal to all. The obligation of the School District must clearly go beyond that gesture, which is totally meaningless to non-English-speaking Chinese students. Compensatory language instruction must be afforded these non-English-speaking children if they are to benefit from the books, materials, facilities, and programs now geared solely for the use of English-speaking students. The School District must provide such language instruction if indeed it wishes to provide equal educational opportunities to all.

Dated, San Francisco, California,

July 25, 1973.

Respectfully submitted,

NORMAN LEW,

Attorney for Amici Curiae.

BILL ONG HING,
Of Counsel.

SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6520

**KINNEY KINMON LAU, a Minor by and through MRS. KAM
WAI LAU, his Guardian ad Litem, et al.,**

Petitioners,

—v.—

ALAN H. NICHOLS, et al.,

Respondents.

**ON WRIT OF CERTIORARI FROM THE UNITED STATES
COURT OF APPEALS, FOR THE NINTH CIRCUIT**

**BRIEF AMICUS CURIAE OF THE PUERTO RICAN
LEGAL DEFENSE & EDUCATION FUND, INC.,
IN SUPPORT OF PETITIONERS**

CESAR A. PERALES

HERBERT TEITELBAUM

STUART R. ABELSON

815 Second Avenue

New York, New York 10017

Attorneys for

*Puerto Rican Legal Defense &
Education Fund, Inc., Amicus
Curiae*

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IN THE
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KINNEY KINMON LAU, a Minor by and through Mrs. KAM
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Petitioners,

—v.—

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Respondents.

ON WRIT OF CERTIORARI FROM THE UNITED STATES
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**BRIEF AMICUS CURIAE OF THE PUERTO RICAN
LEGAL DEFENSE & EDUCATION FUND, INC.,
IN SUPPORT OF PETITIONERS**

Introduction

Interest of Amicus Curiae

The Puerto Rican Legal Defense & Education Fund, Inc. (the "PRLDEF") is a privately funded, not-for-profit, New York corporation organized in 1972. Its mandate includes conducting litigation concerning issues which affect the Puerto Rican community as a whole. In that connection, the PRLDEF has commenced and participated in lawsuits involving voting rights, public assistance, migrant labor, employment discrimination, and the administration

of criminal justice. In addition, the PRLDEF has devoted a substantial amount of its resources to the educational problems which Puerto Rican children are compelled to face. In that context, the PRLDEF has filed *Aspira of New York v. Board of Education of the City of New York*, 72 Civ. 4002 (S.D.N.Y. Sept. 20, 1972) charging officials of the New York City public school system with violations of the rights of Puerto Rican school children to an equal educational opportunity and due process of law. Many of the issues raised by the petitioners herein are similar, if not identical, to the issues raised by the plaintiffs in *Aspira*. A decision on the merits in the instant case may significantly affect the outcome of *Aspira*. Accordingly, Amicus Curiae submits this brief urging reversal of the judgment of the Court of Appeals in *Lau v. Nichols*, 472 F.2d 909 (9th Cir. 1973).¹

Aspira—A Description

Aspira was instituted by the filing of a summons and complaint on September 20, 1972. The action is brought pursuant to 42 U.S.C. §1983 to prevent the deprivation under color of law of rights protected by the Constitution of the United States, in particular, the Fourteenth Amendment thereto, and pursuant to 42 U.S.C. §2000d.

The named plaintiffs, consisting of Puerto Rican children and their parents, as well as *Aspira of New York, Inc.* and *Aspira of America, Inc.*,² brought the action in-

¹ Written consents for the filing of this Amicus Curiae Brief were obtained from attorneys for petitioners and respondents and filed with the Court on July 19, 1973.

² *Aspira of New York, Inc.*, and *Aspira of America, Inc.* are not-for-profit New York corporations primarily concerned with the education of Puerto Rican students. The latter corporation is an affiliate of the former.

dividually and on behalf of a class comprised of approximately 182,000 Puerto Rican and other Spanish speaking children. These plaintiffs attend the public schools of the City of New York, and read, write, speak and comprehend English with substantial difficulty or not at all. They are receiving either no or inadequate educational services intended to take into account their linguistic needs.

The defendants consist of the Board of Education of the City of New York and its members, the Chancellor of the City School District of the City of New York and officials of various local school boards.

The complaint alleges that defendants fail to teach the non-English speaking plaintiffs the language of instruction which is English, and fail to teach them in the only language they understand which is Spanish. As a result, plaintiffs are denied an equal educational opportunity as compared to English speaking students for whom the New York City educational system is almost exclusively tailored. Plaintiffs further charge that the unequal treatment to which they are subjected is based on language, which is inextricably a part of their ethnicity and national origin. Thus, the unequal treatment is invidiously discriminatory. Finally, plaintiffs claim that the consequences of this treatment are educationally devastating and have resulted in lower reading scores, inferior mathematical performance, lower high school graduation and college admission rates, and higher drop out rates, for Puerto Rican youngsters as compared to Anglo-American or Black youngsters.

Aspira and Lau—The Common Issues

On November 15, 1972, the defendants in *Aspira* filed a motion to dismiss the complaint pursuant to Rule 12 of

the Federal Rules of Civil Procedure on the grounds that plaintiffs, *inter alia*, failed to state a claim upon which relief may be granted. On January 23, 1973 the Court denied all aspects of that motion. Several of the issues raised in the motion to dismiss are identical to the issues discussed by the District Court and Court of Appeals in *Lau*.

Stripped to their essentials, *Lau* and *Aspira* present the same threshold question: whether children of one ethnic or national origin group, who do not understand the language of instruction, receive an equal educational opportunity as compared to children of another ethnic or national origin group who do understand that language. For the non-English speaking Puerto Rican children in New York City, as for the non-English speaking Asian-American children in San Francisco, the question has been answered. As defendants in *Aspira* have testified: "... if the youngster is a non-English speaking youngster and ... the educational offerings are in English, ... he is being denied some of the advantages that the English-speaking youngster has."³ The Court in *Aspira*, in denying a motion to dismiss, recognized that "effective equality" is not a simple concept achieved through the application of mechanical formulae. The Court (per Frankel, J.) stated at 58 F.R.D. 62, 63 (S.D.N.Y. 1973):

Despite the perceptions of Anatole France and others, our laws against stealing bread and sleeping in public places continue to apply equally to rich and poor alike, indifferently producing their unequal consequences. We live in a time, however, of unsettling

³ Deposition of Dr. Harvey B. Scribner, Former Chancellor of the City School District of the City of New York. May 9, 1973. Transcript p. 56.

questions about settled dogma. Among the unevenly developing results has been a growing principle that at least in respect of cherished human interests—as, for example, the unattained ideal of equal justice for rich and poor, *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed.2d 811 (1963); *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), the right to vote regardless of poverty, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed.2d 169 (1963), and the right to be free from even unintended disadvantages at governmental hands because of race or origin, *Chance v. Board of Examiners*, 458 F.2d 1167, 1170, 1177 (2d Cir. 1972); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968)—the notion that sharply disparate people are legally fungible cannot survive the constitutional quest for genuine and effective equality.

However, the Court of Appeals in *Lau* avoids translating the educational deprivation suffered by non-English speakers into constitutional dimensions because: "Under the facts of this case, appellees' responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers, and curriculum as is provided to other children in the district." *Lau v. Nichols*, *supra* at 916. The educational by-product of this restrictive constitutional view is to continue to sanction a system in which members of an identifiable national origin or ethnic group are compelled to exist in a school environment where they are not educated. Such a system is not only dysfunctional, it is irrational. Simply put, a student who does not understand his teacher or his books or his classmates does not learn. And, a system that

is constructed in a manner which ignores a group of children of a particular national origin or ethnic group while it caters to another is antithetical to the notion of equal protection.

Accordingly, Amicus Curiae submits that the Court of Appeals in *Lau* erred in holding that the presence of past segregation is a condition precedent to a violation of petitioners' present right to an equal educational opportunity. Amicus Curiae further submits that exculpating respondents from causing petitioners' "language deficiency" cannot justify respondents circumventing their constitutional responsibility. Whether or not respondents caused petitioners' initial difficulty with understanding and speaking English is not relevant to the crucial issue raised by the present case. This issue is the constitutionality of constructing and maintaining an educational system, the effect of which is to burden a group of children on the basis of their national origin or ethnicity.

The Educational Impact

The disparity in treatment and the difference in result of the education of English speakers as opposed to non-English speakers is sufficiently blatant. A statistical analysis is not needed to demonstrate the discriminatory nature of the educational scheme established by San Francisco and New York.

Nevertheless, although discovery is not complete in *Aspira*, defendants have produced statistics indicating that Puerto Rican children in the New York City public school system are performing below their Anglo-American and Black counterparts and are receiving an inferior education

because, in large part, they cannot understand the language of instruction.

The failure to take into account the linguistic characteristics of Puerto Rican children is particularly critical for a city such as New York which contains more than half of the nearly one and one half million Puerto Ricans residing in the continental United States.⁴ As a result of this large New York concentration of Puerto Ricans and other Spanish-surnamed persons, approximately 27 percent of the New York City public school children are of Hispanic extraction.⁵ In approximately 72.1 percent of the homes from which these children come, Spanish is the language normally spoken by the parents and other family members.⁶ As expected, the language difficulty of the Puerto Rican and other Hispanic student population is acute. According to statistics supplied by the Board of Education of the City of New York as of October 26, 1971, over 100,000 of these children have some language difficulty. More than one-third of that number have been characterized by the Board of Education, itself, as having "severe language difficulty."⁷

⁴ United States Department of Commerce, Bureau of the Census, *Persons of Spanish Origin in the United States: November 1969*, February 1971, p. 20. United States Department of Commerce, Bureau of the Census, *General Social and Economic Characteristics*, May 1972, p. 295.

⁵ Board of Education of the City of New York, "Special Census as of October 29, 1971."

⁶ United States Department of Commerce, Bureau of the Census, *Persons of Spanish Origin in the United States: November 1969*, February 1971, p. 20.

⁷ Board of Education of the City of New York, "Language Survey as of October 29, 1971, Ability to Speak English by School Level by District," June 5, 1972, p. 206.

The large number of Puerto Rican children with language difficulty in New York City, coupled with the paucity of programs tailored to their linguistic needs results in Puerto Rican children receiving shockingly low reading scores on standardized reading tests given throughout New York City. Thus, of the sixty-six (66) elementary schools in New York City containing 85 percent or more students who read below grade level, almost two-thirds of these schools have a student population containing more than 50 percent Puerto Rican children. In those elementary schools where more than 90 percent of the student body reads below grade level, all but two of these schools contain over 50 percent Puerto Rican students and more than half of these schools have a student population containing over 71.2 percent Puerto Rican student population.⁸ Viewed on a larger scale, the five New York City School districts which have the lowest rank in reading scores as of 1972 include the four districts with the heaviest concentration of Puerto Rican students.⁹

The above statistics do not, of course, include the thousands upon thousands of Puerto Rican students whose reading levels are not tested because their English speaking difficulty is so severe as to render any such test meaningless.¹⁰

⁸ Bureau of Educational Research, Board of Education of the City of New York, "Ranking of Schools by Reading Achievement, October, 1972," p. 6; "Special Census as of October 29, 1971."

⁹ Bureau of Educational Research, Board of Education of the City of New York, *1971-72 City Wide Reading Tests Results*, p. 22; "Special Census as of October 29, 1971."

¹⁰ Defendants in *Aspira* have admitted "... the allegations that defendants annually administer the Metropolitan Reading Achievement Tests throughout the City of New York and that approxi-

In sum, to dismiss petitioners and hold that they receive the same educational opportunity as English speakers side-steps the educational as well as the constitutional realities confronting children who cannot understand English.

ARGUMENT

POINT I

Respondents' Treatment of Petitioners Violates the Equal Protection Clause.

By failing to take reasonable steps to teach petitioners English, respondents have erected a classification between school children who receive instruction in a language they understand and those who do not, and such classification is based upon the prime national origin characteristic of Asian-Americans—their language. Accordingly, the educational curricula in San Francisco invidiously discriminates against petitioners, and in that respect it should be struck down. *Korematsu v. United States*, 323 U.S. 214 (1944).

Instructing all children including petitioners in English, while failing to take reasonable steps to teach petitioners to understand and speak English does not fulfill the notion of even-handedness. Providing all children including petitioners with the same English written books, while failing to take reasonable steps to teach petitioners to comprehend the symbols on the pages of those books is not equal treat-

mately 28,000 children in the school year 1971-72 were not given the test because they speak, read, write and comprehend English with such severe difficulty, if at all, as to make the results meaningless." *Aspira of New York v. Board of Education of the City of New York*, 72 Civ. 4002, "Defendants' Answer to Complaint," February 9, 1973, Paragraph thirty-four.

ment as embodied in the Fourteenth Amendment.¹¹ On other occasions this Court has been presented with facially neutral action, and has not hesitated to invoke the prohibitions of the equal protection clause when such action particularly burdened a racial, national origin or ethnic group. Thus, in *Hunter v. Erikson*, 393 U.S. 385 (1969), this Court pierced a housing ordinance which appeared neutral but which, in reality, burdened minority groups in Akron, Ohio. The Court observed:

Moreover, although the law on its face treats Negro and White, Jew and Gentile, in an identical manner, the reality is that the law's impact falls on the minority. *Id.* at 391.

In other instances, laws which apply to all in an identical manner were declared unconstitutional because of a disparate effect on individuals with different backgrounds and characteristics. For example, in *Douglas v. California*, 372 U.S. 353 (1963) the notion of equal justice for all persons, rich or poor, compelled this Court to declare unconstitutional a California rule of criminal procedure permitting the State to deny appointed counsel to indigents on appeal. There, Justice Douglas writing for a majority, stated:

¹¹ The idea that children who come to school with different characteristics from the majority of a school population cannot be denied equal educational opportunity has been recognized in other fields. In *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), mentally-retarded children plaintiffs were allegedly excluded from public school because of their retardation. After agreement had been reached between the parties, the Court approved a plan recognizing that "[i]t is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . ." *Id.* at 1260. See *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D. D.C. 1972).

... [A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' *Id.* at 356.

See, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

More recently, in *Wisconsin v. Yoder*, 32 L. Ed.2d 15 (1972), the Court upheld the First Amendment right of Amish parents to the free exercise of religion, and declared the Wisconsin compulsory school attendance law to be an unconstitutional infringement of that right. In brushing aside the argument that the Wisconsin statute was neutral, applying to all alike, the Court stated:

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Id.* at 28.¹²

¹² In other education cases, courts have applied equal protection analysis to strike down schemes facially and administratively neutral. Courts have held invalid the use of educational tests, geared toward white students which showed discriminatory results when given to children racially or ethnically different from the majority. *Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972). Additionally, Spanish speaking students have successfully attacked the discriminatory usage of tests written and administered in English. In *Diana v.*

And, Justice Stewart, concurring in *San Antonio Independent School District v. Rodriguez*, 41 U.S.L.W. 4407, 4425 (March 21, 1973), pointed out the unconstitutional ramifications of legislation which causes a discriminatory effect:

Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. (Emphasis added) (Citations omitted.)

For other discriminatory impact cases, see *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972);¹² *Kennedy Park*

State Board of Education, Civil Action No. C-7073 RFP (N.D. Cal. Feb. 2, 1970) and *Guadalupe Organization v. Tempe Elementary School District No. 3*, No. Civ. 71-435 (D. Ariz. Jan. 24, 1972), plaintiffs alleged improper classification as mentally retarded based on examinations conducted in English. As a result, Spanish speaking youngsters with normal or above normal intelligence were receiving the limited instruction offered the mentally retarded. In both cases, the parties reached agreements which were adopted as orders of the court alleviating the misclassifications.

¹² In *Chance v. Board of Examiners*, *supra*, a case in which civil service examinations which excluded Blacks and Puerto Ricans from principalships and assistant principalships in New York City schools were effectively challenged, the Second Circuit stated at 1175:

[T]he district court found that the Board's examinations have a significant and substantial discriminatory impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug.

Homes Ass'n. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied 401 U.S. 1010 (1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).¹⁴

Similarly, San Francisco's facially neutral educational procedures offend the constitutional requirement for equal educational opportunity, and unlawfully burden members of a particular racial and national origin group.

The Court of Appeals in *Lau* unsuccessfully attempts to distinguish *Douglas* and *Griffin*, on the theory that these decisions rest on the lack of a relationship between the ability to pay a fee and the purposes of criminal justice. *Lau v. Nichols*, *supra* at 916. However, the thrust of those cases was the unequal result produced by a seemingly neutral procedure. But even applying the Court of Appeals' interpretation of *Douglas* and *Griffin* to the facts of *Lau* would nonetheless mandate a reversal of the *Lau* decision. The Court of Appeals painstakingly details the importance of English in the United States:

[T]he State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. §1423(1); likewise, California requires knowl-

¹⁴ In *Norwalk CORE v. Norwalk Redevelopment Agency*, *supra*, the Court held that when an otherwise even-handed method of relocating persons by urban renewal has the effect of placing fewer members of the disadvantaged, the result was discriminatory and affirmative governmental action was necessary to rectify the wrong done.

edge of the language for jury service, Cal. Code Civ. P. §198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the State, Cal. Const. art. IV, §24; Cal. Code Civ. P. §185, and of the nation. Use of English in the schools has this firm foundation, while the requirement of money payments in the criminal system does not.

Petitioners are demanding that they be given an opportunity to learn English. Amicus Curiae submits that given the importance of learning English as stated by the Court of Appeals, respondents' failure to take reasonable steps to teach petitioners English bears no relationship to the purpose of education—especially since educational instruction takes place in English.¹⁵

***The Test to Be Applied Under the
Equal Protection Clause***

In cases involving national origin or racial discrimination, the disparity in treatment is subject to the strictest scrutiny. In *Korematsu v. United States*, *supra* at 216, a

¹⁵ In the criminal justice area, violations of due process have been cited when a defendant is forced to face procedures in a language he does not understand. The Second Circuit Court of Appeals in *U. S. Ex Rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970), upheld the release of a defendant who spoke and understood only Spanish and thus was given no meaningful opportunity to participate in his trial. The Court stated:

To Negron, most of the trial must have been a babble of voices '[R]egardless of the probabilities of his guilt, Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment.' *Id.* at 388-389.

Similarly, for petitioners, their classroom instruction is a "babble of voices".

Japanese relocation case, the Court began its analysis with the following warning:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect It is to say that courts must subject them to the most rigid scrutiny.

See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *McGowan v. Maryland*, 366 U.S. 420 (1961). The facts in *Lau* compel the application of the strictest scrutiny.

However, a violation of the equal protection clause is present whether or not a strict scrutiny standard is employed. Thus, the invidious classification perpetrated by the San Francisco school authorities cannot pass constitutional muster even under the rational basis test as enunciated in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972):

The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, *but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.* *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe R. Co. v. Ellis*, 165 U.S. 150 (1897); *Yick Wo v. Hopkins*, 113 U.S. 356 (1886). (Emphasis supplied.)

As Justice White recently wrote dissenting in *San Antonio Independent School District v. Rodriguez*, *supra* at 4427:

Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, with-

out also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.

The goal in the instant case is the education of children. The importance of that goal is well established. In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) the Court observed:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In *Wisconsin v. Yoder*, *supra* at 29, the Court reaffirmed this notion: "No one can question the State's duty to protect children from ignorance" Moreover, the Court recognized and accepted the close interrelationship between

education and the protection of fundamental rights and the performance of fundamental duties:¹⁸

... [A]s Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions. *Id.*

Indeed, this Court has noted that at a minimum, a child's classroom education must include the learning of "... basic reading, writing, and elementary mathematics ..." *Wisconsin v. Yoder, supra* at 23. By failing to teach petitioners the language of instruction, respondents have precluded petitioners from learning these critical skills. A system, such as San Francisco's, which effectively refuses to teach a portion of its students to read and write and otherwise communicate in English "results in the absolute deprivation of education." *San Antonio Independent School District v. Rodriguez, supra* at 4414.

Thus, it is difficult, if not impossible, to imagine any rational relationship between the educational goals of respondent San Francisco Unified School District, and its policy of denying substantial numbers of non-English speaking Chinese children assistance in learning the language of instruction.

¹⁸ The connection between a minimum of education and the full and effective exercise of the rights of citizenship is particularly applicable to Puerto Ricans, whether or not they speak English, since they are all United States citizens pursuant to the Jones Act, 48 U.S.C. §731 et seq. (1917).

POINT II

Respondents' Treatment of Petitioners Violates the Due Process Clause.

Respondents deny petitioners due process of law by compelling their attendance in school programs, which fail to provide any meaningful education to them.

Along with thousands of other school age children, petitioners are compelled by authority of law to attend classes in approved schools. Cal. Educ. Code §12101. This compulsion is backed by force of severe penalties. Cal. Educ. Code §12404. As most students, however, petitioners eagerly seek the benefits of education; but respondents fail to teach them the English language. Petitioners are thereby effectively excluded from reaping these benefits. The absence of effective education concerning petitioners is the *de facto* equivalent of the "absolute deprivation" of education which the Court alluded to in *San Antonio Independent School District v. Rodriguez, supra* at 4414. Consequently, the San Francisco school system fails to provide non-English speaking petitioners "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights to speech and of full participation in the political process." *Id.* at 4418. Such a system is patently arbitrary and capricious and courts have struck down similar governmental schemes which force persons, under penalty of law, into institutions which are created for, but in fact, do not benefit them.

In *Mills v. Board of Education of the District of Columbia, supra* at 874, a due process case, the Court observed:

"... [R]equiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children."

In other contexts in which the state presumes to exercise beneficent control over children, the courts have made certain that the benign purpose was in fact being carried out. See, *In Re Gault*, 387 U.S. 1, 22 n. 30 (1967) where the Court stated:

... to the extent that ... special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a *quid pro quo*.

In *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) the Court found violations of the due process clause in the failure of the State to provide rehabilitative programs to its juvenile inmates. Among the anti-rehabilitative conditions which led the Court to its finding was the failure of the defendants to provide adequate education to the inmates. The Court noted: "As to education, there is a bitterly cruel irony in removing a boy from his parents because he is a truant from school and then confining him ... where he gets no education." *Id.* at 1369. The irony is no less cruel and no less violative of due process in the instant case, where petitioners regularly attend schools at the command of the State, but are denied the benefits of education. See *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), where the Court found due process violations in the failure to treat children in New York detention centers.

Cases such as *Martarella* and *Inmates of Boys' Training School* which concern the custodial treatment of children are representative of the expanding number of cases which find due process violations when the "right to treatment" is denied. Perhaps the clearest statement of the right is Judge Johnson's in *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971): "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." *Wyatt v. Stickney*, *supra*, concerned the failure to treat involuntarily committed patients in state mental hospitals. See, *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). The similarity of the predicaments of the untreated mental patients and these petitioners—both forced to sit by, day after day, without receiving the benefit upon which their institutional presence is predicated—is manifest.

Here, petitioners do not attack required school attendance. On the contrary, they challenge respondents' failure to institute a system which provides them with the most basic requirement for learning—an understanding of the medium of instruction. In light of respondents' failure, petitioners' right to due process of law has been violated.

CONCLUSION

Because the treatment of petitioners violates both the equal protection and due process guarantees of the Fourteenth Amendment, and because the opinion of the Court of Appeals is contrary to the weight of authority, this Court should reverse its judgment in all respects.

Respectfully submitted,

CESAR A. PERALES

HERBERT TEITELBAUM

STUART R. ABELSON

Attorneys for

*Puerto Rican Legal Defense &
Education Fund, Inc., Amicus Curiae*

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MICHAEL RODAK, JR.

In the Supreme Court of the
United States

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU, a Minor by and through
MRS. KAM WAI LAU, his Guardian ad Litem,
et al.,

Petitioners,

vs.

ALAN H. NICHOLS, et al.,

Respondents.

On Writ of Certiorari to the United States
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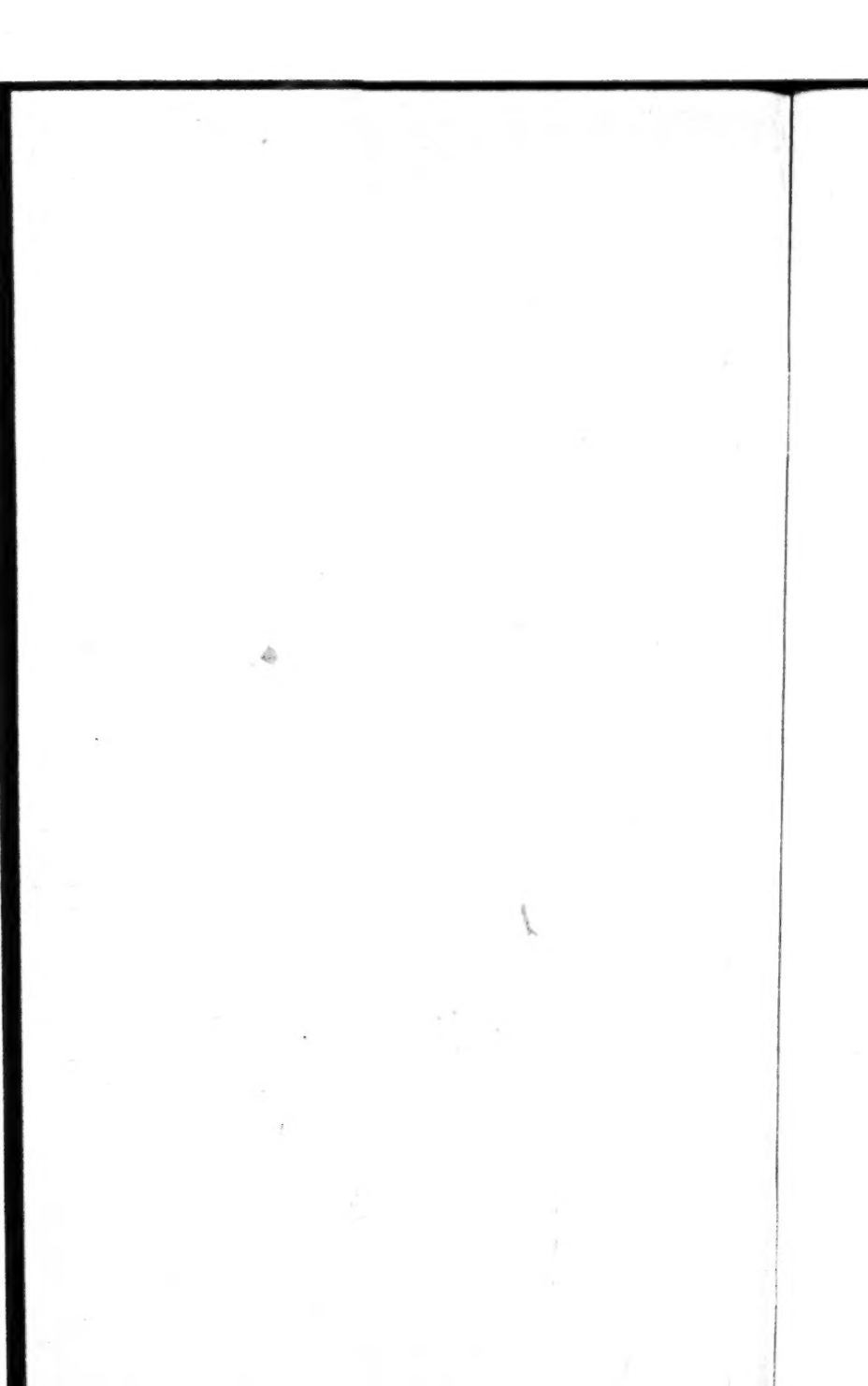
Brief for San Francisco Lawyers' Committee for
Urban Affairs as Amicus Curiae in
Support of Petitioners

W. REECE BADER
600 Montgomery Street
San Francisco, CA 94111

Attorney for Amicus Curiae

JAMES R. MADISON
600 Montgomery Street
San Francisco, CA 94111
Of Counsel

July 30, 1973



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Court of Appeals for the Ninth Circuit

**Brief for San Francisco Lawyers' Committee for
Urban Affairs as Amicus Curiae in
Support of Petitioners**

INTRODUCTION

This brief is filed in support of petitioners with the consent of both sides pursuant to Supreme Court Rule 42(1). Letters exhibiting such consent are attached to our letter of transmittal to the Clerk of the Court. Reference is made to the Brief for the Petitioners for the orders and opinions below, the Court's jurisdiction, the question presented for review, the constitutional and statutory provisions involved and statement of the case.

INTEREST OF AMICUS CURIAE

The San Francisco Lawyers' Committee for Urban Affairs was organized in 1968 as an affiliate of The Lawyers' Committee for Civil Rights Under Law. The San Francisco Lawyers' Committee was formed as a means of involving the private bar in the City and County of San Francisco in the problems of discrimination and poverty. Since the organization of the Lawyers' Committee, numerous lawyers in private practice in San Francisco have under its auspices undertaken the representation of disadvantaged local citizens. Such lawyers have provided counsel to individuals, minority owned businesses and other non-profit community-based organizations, and have also appeared in law suits to remedy discrimination in housing, employment, education and the availability of public facilities. The Lawyers' Committee is committed to prompting the organized bar in San Francisco to a continuing concern with public problems. Its objective is achievement of social justice and equal rights as a reality for all. Its interest in this case arises from the denial by respondents of equal educational opportunities in San Francisco for non-English speaking children and the consequent denial of access for such children to the mainstream of life in the United States.

ARGUMENT

I

Where Disparity in Ability to Respond to Educational Opportunities May Reflect Lingering Effects of Historic State Imposed Segregation and Discrimination, Respondents Have a Duty to Show Absence of Proximate Connection or Take Remedial Action

The condition of persons of Chinese origin in California in general and San Francisco in particular is marked by a dismal history of official discrimination which extends almost to the date of admission of the state to the Union. This discrimination has infected the educational opportuni-

ties available to individuals of Chinese extraction as well as their status in general.

State discrimination specifically against Chinese can be traced to as early as 1854, when a statute disqualifying Black persons from testifying in cases in which a white was a party was construed to disqualify Chinese as well. *People v. Hall*, 4 Cal. 399 (1854). The Court reasoned that it would be "anomalous" to allow testimony by people:

"whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impossible difference" 4 Cal. at 405.

Discrimination against Chinese in employment began not later than with enactment of the Foreign Miners Tax Act of 1853, which levied a monthly tax on foreigners as a condition of employment in mining. Ch. 61, [1853] Calif. Stats. 218. Although general in form, this statute was in fact directed at Chinese, whose payments amounted to 85 per cent of the revenue collected pursuant to it. THOMAS W. CHINN, *A HISTORY OF THE CHINESE IN CALIFORNIA* 24 (1969) (hereinafter cited as CHINN).

New discriminatory taxes were enacted to haunt Chinese as they moved from mining labor, for which they originally immigrated, into other occupations. See CHINK 12 (Cheng-Tsu Wu ed. 1972). Thus, a monthly head tax was enacted in 1860 for Chinese engaged in fishing. Ch. 316, [1860] Calif. Stats. 307. This was followed in 1862 by a monthly tax on all "Mongolians" 18 years old or more, unless they already paid a miners' tax or were employed in the production of sugar, rice, coffee or tea (none of which were then culti-

vated in California). Ch. 399, [1862] Calif. Stats. 462. San Francisco was not to be outdone by the legislature, as it adopted a series of ordinances penalizing Chinese-oriented laundries in one manner or another. CHINN 24.¹

The most sweeping prohibitions, however, were embodied in the second state constitution, which was adopted in 1879, and a statute enacted pursuant to it. The constitution forbade employment of Chinese by any corporation, state, county or municipal government. CALIF. CONST. art. XIX, §§ 2-4 (1879). The subsequent legislation made it a misdemeanor for anyone associated with a corporation to employ a "Chinese or Mongolian" in any manner. Ch. 3, [1880] Calif. Stats., Amendments to the Penal Code 1.

Economic discrimination was extended from employment into property rights. An early San Francisco ordinance, for example, which was aimed at and enforced primarily against the Chinese, prohibited any person from hiring or letting sleeping rooms with less than 500 cubic feet of space per person. CHINN 24. Later, the legislature encouraged the creation of ghettos by authorizing counties, cities and towns to adopt ordinances requiring Chinese to live outside their boundaries or inside segregated areas within their limits. Ch. 29, [1880] Calif. Stats. 22.

As late as 1921, the California electorate adopted an initiative measure which prohibited persons ineligible for citizenship from owning agricultural land (one of the prime sources of wealth in the state). [1921] Calif. Stats. lxxxvii. As a result, Chinese (and Japanese as well) not only had to refrain from acquiring new land, but even had to divest

1. Although two of these were voided by the local county court, CHINN 24, a third survived until it encountered one of the first great civil rights decisions of this court. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

themselves of existing holdings. This statute stood up until 1952. *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

Not content with discrimination against Chinese already living here, California also enacted discriminatory immigration legislation. An early statute levied a head tax upon masters, owners and consignees of ships which carried in persons who could not become citizens. Ch. 153, [1855] Calif. Stats. 194. When this was ruled unconstitutional, the legislature acted directly to ban the further immigration of "Chinese or Mongolians" into the state. Ch. 313, [1858] Calif. Stats. 295. A more sophisticated enactment in 1870 granted unbridled discretion to the local commissioner of immigration to reject because of physical, mental or moral infirmity any Chinese or Japanese female who sought to immigrate. Ch. 230, [1869-1870] Calif. Stats. 330.² Similar legislation was directed at persons who brought in Chinese or Mongolian immigrants in general. Ch. 231, [1869-1870] Calif. Stats. 332.³ Finally, it was a Federal court sitting in California which established the precedent for denying citizenship to Chinese even when they succeeded in immigrating. *In re Ah Yup*, 1 F. Cas. 223 (No. 104) (C.C.D. Cal. 1878).

Those Chinese who did acquire citizenship were nevertheless relegated by the people of the state to second class citizenship. The constitution of 1879 disqualified persons born in China from voting. CALIF. CONST. art. II, § 1

2. This statute was held by this Court to be an unconstitutional regulation by a state of foreign commerce. *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

3. Although this statute was also declared unconstitutional, pressures from California led to Federal legislation restricting the immigration of Chinese. See generally *Chae Chin Ping v. United States*, 130 U.S. 581, 595-96 (1889).

(1879). Later, in 1891, when the children of Chinese immigrants began to reach voting age, an English-only literacy test was passed by the legislature to keep them away from the polls. See *Castro v. State*, 2 Cal. 3d 223, 230, 85 Cal. Rptr. 20, 24, 466 P.2d 244, 248 n. 11 (1970).

The United States Commission on Civil Rights has written that:

"The public schools traditionally have provided a means by which those newly arrived in the cities—the immigrant, and the impoverished—have been able to join the American mainstream." U.S. COMMISSION ON CIVIL RIGHTS, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* 1 (1967). (hereinafter cited as *RACIAL ISOLATION*).

If we accept this proposition, then the capstone of California's pervasive discrimination against Chinese lay in its efforts to exclude them from opportunities to obtain an education. At the outset, while California required that public schools be maintained for white and mandated separate schools for Black and Native American children, it made no provision whatsoever for public schooling for Chinese children. Compare ch. 556, § 53 [1869-1870] Calif. Stats. 838 with *id.*, § 56 at 839. The same enactment also specifically excluded "Mongolian" children from the census counts upon which allocations of state funds were to be based. *Id.*, § 94 at 850. When the word "white" was deleted by a subsequent amendment from the basic authorization of those to whom schools were to be open, the California Supreme Court was led to rule that admission of Chinese children was required. *Tape v. Hurley*, 66 Cal. 473, 6 Pac. 129 (1885). The legislature promptly responded by passing a bill which authorized local school boards to establish separate schools for Chinese students and denied admission of such students "into any other schools" if separate schools were established. Ch. 117, [1884-1885] Calif. Stats. 100.

San Francisco was one of the communities which took advantage of the legislation to establish a segregated school system for its children of Chinese origin. See *Wong Him v. Callahan*, 119 Fed. 381 (C.C.N.D.Cal. 1902); see also *Guey Heung Lee v. Johnson*, 92 S. Ct. 14 (1971) (per Douglas, J. as Circuit Justice on application for stay).

Segregation of students of Chinese origin as established in San Francisco was strictly enforced, and efforts to persuade the legislature to end segregated schools were unavailing. See H. LAI & P. CHOY, *HISTORY OF THE CHINESE IN AMERICA* 99-100 (1972); Mary Lee, *Problems of the Segregated School for Asiatics in San Francisco* (1921) (Unpublished master's thesis at University of California, Berkeley). The school segregation statute survived for more than 60 years before it was finally repealed in 1947. Ch. 737, § 1 [1947] Calif. Stats. 1792.

The segregation of Chinese students in the San Francisco school system resulting from the combination of state and local policies was patently offensive to the Fourteenth Amendment under the standard enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Guey Heung Lee v. Johnson*, *supra*, 92 S. Ct. at 15 ("the classic case of *de jure* segregation").

Moreover, the education that has historically been made available by the San Francisco public school system to students of Chinese extraction has been inferior and thereby unequal even under the hoary standards of *Plessy v. Ferguson*, 163 U.S. 537 (1896). The median educational level attained by persons 25 years old or more in 1970 in Census Tracts nos. 114 and 118 in San Francisco, which encompasses the heart of Chinatown and has a population more than 90% Chinese in origin, was 5.6 years of schooling, whereas the median level of educational attainment among

the same age group for San Francisco as a whole, only about 8% of the population of which is Chinese, was markedly higher at 12.4 years. E. Gareth Hoachlander, Socio-Economic Statistical Summary for Chinatown, San Francisco, California July 11, 1973 (Unpublished report of Childhood and Government Project, University of California, Berkeley).⁴

Disparity in years of school completed, of course, is compounded by disparity in verbal achievement per year. RACIAL ISOLATION 13. The disparity in number of years of school completed understates the inferiority of education provided San Francisco children of Chinese origin, as a principal feature of the segregated schools was inferior education in the English language.⁵ H. LAI & P. CHOY, HISTORY OF THE CHINESE IN AMERICA 101 (1972).

Given the history outlined above, it may reasonably be inferred that the inability to communicate in English experienced by at least those of petitioners who were born in the United States did not develop as a result of normal socialization, but reflects the lingering effects of the long standing unconstitutional discrimination against people of Chinese origin and the maintenance of inferior segregated schools for them in San Francisco. It is reasonable to suppose, so to speak, that not every root of such segregation has been tracked down and grubbed out.

The Court of Appeals assumed to the contrary, but without examining the point, that the inability of petitioners

4. All data reportedly taken from U.S. DEPT. OF COMMERCE, 1970 CENSUS OF POPULATION & HOUSING: CENSUS TRACTS: SAN FRANCISCO-OAKLAND, CALIF. STANDARD METROPOLITAN STATISTICAL AREA (1972).

5. Inferior education in English was reinforced by the tendency of Chinese in the United States to turn inward and retain their original language in response to discrimination on other fronts in addition to education. See *Castro v. State*, 2 Cal. 3d 223, 230, 85 Cal. Rptr. 20, 24, 466 P.2d 244, 248 n. 11 (1970).

here to speak English was "the result of deficiencies created by . . . themselves in failing to learn the English language." *Lau v. Nichols*, 472 F.2d 909, 917 (9th Cir. 1973), *cert. granted*, U.S. (June 11, 1973). The District Court apparently gave no consideration whatsoever to the source of petitioners' disabilities.

We submit that the courts below erred in so approaching this case and that their error on this point led them into error in deciding whether the constitutional requirement for elimination of state mandated segregation imposes a duty on respondents to teach petitioners English. *cf. United States v. Texas*, 342 F. Supp. 24 (E. D. Tex. 1971).

We do not assert as a matter of law that petitioners' disabilities result proximately from San Francisco's historic policy of maintaining segregated schools for Chinese students. That, of course, is a question of fact. We do know, however, as this Court well knows from the array of litigation that has confronted it over the past 19 years, that given a "history of segregation," as the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), all vestiges of it will not vanish overnight without a trace merely upon issuance of a mandate for elimination.

Indeed, given a history of segregation and conditions which may be traceable to that segregation, we submit that it is not enough for respondents to plead sanctimoniously that they are delivering a racially neutral education. We submit that under such circumstances it is incumbent upon respondents to show that the current disparity between the capacity of respondents and that of other students in the district to respond to education "is in no way the result of past segregative actions." *Keyes v. School Dist. No. 1*, 41 U.S. L.W. 5002, 5008 n. 17 (U.S. June 21, 1973).

Put another way, while there is not one school black and another white, there is one group able to comprehend the education offered and another unable to do so. The constitutionally significant fact is that the latter is Chinese in national origin. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Truax v. Raich*, 239 U.S. 33 (1915). The language barrier results in a segregation and isolation within schools just as certain and effective as if respondents were maintaining separate sets of buildings for petitioners and for English speaking students. This case presents sufficient indications of complicity in petitioners' predicament on the part of respondents or their official predecessors to require reversal and remand for further hearings at which respondents, if they be so inclined, may seek to justify the present situation as not the product of discrimination.

If the respondents are unable to sustain such burden of proof, it is only equitable that they be compelled to propose remedial action which will eliminate the remaining effects of the historical discrimination "root and branch." *Green v. County School Board*, 391 U.S. 430, 438 (1968). The time for such action is now, if not long past. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

II

Respondents' Failure to Teach English to Students of Chinese Origin When They Are Conscious of Need For Such Teaching in Order to Provide Benefit From Education Constitutes Constitutionally Impermissible Discrimination

Respondents contend that in offering precisely the same classes and other educational services to petitioners as to English speaking students in the district, they are satisfying their duty under *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), to provide education, if at all, then to all on equal terms. This was enough for the District Court and for the Court of Appeals. *Lau v. Nichols*, 472 F.2d

909, 916 (9th Cir. 1973). We urge this Court to recognize error in such reasoning.

First of all, it takes no account of the education received. This Court has recognized that education implies a communication of ideas. See *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 641 (1950). It can scarcely be denied that communication implies receiving as well as sending and that reception in turn is illusory without comprehension.

So far as comprehension is concerned, petitioners are not only "functionally deaf," as Judge Hufstедler wrote in dissenting from the Court of Appeals denial of rehearing en banc (A. 142), they are effectively blind as well. It is all very good and well for a court to write, as the Court of Appeals did here, of each student bringing "different advantages and disadvantages" "to the starting line of his educational career." *Lau v. Nichols*, *supra*, 472 F.2d at 915. We submit, however, that the same court strays into error when it holds that respondents have no duty to attempt to remedy impediments to learning which "are characteristic of a particular ethnic group." *Ibid*.

We are not dealing in this case with individual characteristics. Petitioners' language is Chinese, not English, not because of any differences in intellectual capacity or psychological condition which are as likely to occur in one ethnic group as another. To the contrary, the class of students who are not receiving an education is distinguished by its Chinese national origin.⁶ If petitioners were receiving

6. Although this case is brought on behalf of Chinese speaking students, the arguments in this section and the next apply with equal force to the cause of other non-English speaking children in the classrooms of Respondents and other public school districts. Thus, the decision of this Court may affect as many as 5 million children in the country who, because of national origin, have a first language other than English. Dept. of Health, Education & Welfare, Draft: Five-Year Plan 1972-77: Bilingual Education Program (August 24, 1971).

an education in proportion to their intellectual capacity we would have no complaint. However, when respondents utilize English exclusively for classroom communication without purporting to serve any compelling state interest⁷ and thereby deprive petitioners of an education because of their Chinese origin without regard to their intellectual capacity, we submit that they run afoul of the Fourteenth Amendment. Compare, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971), with *McLaughlin v. Florida*, 379 U.S. 184 (1964)

Moreover, the existence of non-English speaking Chinese students in respondents' schools is not a transitory phenomenon. The data showing 1790 students in the class represented by petitioners and 1066 additional Chinese-speaking students in respondents' schools who were receiving special education in English were as of the 1969-1970 school year.⁸ The problems had existed before then, and the Court of Appeals noted that these numbers continue to reflect the dimensions of the situation even in the 1972-1973 school year. *Lau v. Nichols*, 472 F.2d 909, 910-11 n. 1 (9th Cir. 1973). Respondents claim an absence of responsibility for petitioners' plight, not lack of awareness of it.

Some courts would find such discrimination by reference to ethnicity enough to impose upon respondents the affirm-

7. Section 71 of the California Education Code, which formerly required the use of English exclusively in public school teaching, was amended in 1967 to establish as the policy of the state merely that all pupils master English. CALIF. EDUC. CODE § 71 (West 1969). This implies only that English be taught (presumably to petitioners as well as other students).

8. Such data, incidentally, are silent as to the number of Chinese of school age in San Francisco who have avoided enrolling in school or "dropped out" because of the language barrier. The data available in the *Keyes* case, for example, showed a substantial drop in proportion of Spanish-speaking students from elementary through high school, which may be associated with discouragement at language barriers. *Keyes v. School District No. 1*, 41 U.S.L.W. 5002, 5004 n. 7 (U.S. June 21, 1973)

ative duty of taking such steps as "reasonably feasible" to eliminate it. *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 881, 31 Cal. Rptr. 606, 610, 382 P.2d 878, 883 (1963). At the least, respondents' unrelenting failure to remedy the persistent problem of Chinese students' inability to function in English of itself warrants the inference that respondents are unconstitutionally discriminating against petitioners and should be required to compensate for the consequences of their conduct. Cf., e.g., *Gaston County v. United States*, 395 U.S. 285 (1969); *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 958, 92 Cal. Rptr. 309, 322, 479 P.2d 669, 682 (1971) (action to preserve so-called de facto segregation transforms it into de jure segregation).

Many of the class petitioners represent, moreover, were not born in the United States, but are recent immigrants, Compare A. 32 with A. 57. As this Court has recently noted:

"From its inception, our Nation welcomed and drew strength from the immigration of aliens." *In re Fre Le Poole Griffiths*, 41 U.S.L.W. 5143 (U.S. June 25, 1973).

Those of petitioners who have been welcomed as immigrants must find particularly galling the Court of Appeals pronouncement that they have no right to learn English, in effect, because they do not already know it. *Lau v. Nichols*, 472 F.2d 909, 917 (9th Cir. 1973). A working knowledge of English, of course, is required for immigrants to advance from alien to citizen. 8 U.S.C. § 1423 (1). As previously noted, the public schools are counted upon to provide this training in English. See RACIAL ISOLATION 1. To the extent, therefore, that petitioners to whom respondents are refusing to teach English are immigrants, the effect of respondents' policy is the same as almost 100 years ago, when San Francisco first denied citizenship

to Chinese immigrants. *In re Ah Yup*, 1 F. Cas. 223 (No. 104) (C.C.D.Cal. 1878). Regardless of whether respondents' present policy again singles out Chinese or whether other immigrants suffer from a similar denial of training in English, respondents' denial of educational opportunity offends *Graham v. Richardson*, 403 U.S. 365 (1971).

III

Where Respondents Fail to Provide Special Educational Services to Petitioners on the Same Basis as to Other Educationally Handicapped and Disadvantaged Students, Petitioners Are Denied Their Rights to Equal Protection

Approximately 8800 of the total of some 90,000 students in the San Francisco Unified School District were classified as mentally handicapped, educationally (emotionally) handicapped or physically handicapped in the school year 1968-1969. A. 94-95. All these students were receiving special training from respondents. *Ibid.* Petitioners and other non-English speaking students of Chinese origin have been aptly characterized by a Court of Appeals judge as "functionally deaf and mute." A. 142. They suffer from this disability because they are Chinese in national origin. In contrast to the 100% for other handicapped students, however, less than 40% (1066 out of 2866) of the Chinese whose disability may be associated with their ethnicity were offered special classes.

Students whose handicaps or needs for special educational assistance are regarded as resulting from poverty or cultural or linguistic isolation from the community at large are characterized in contemporary lexicon as "educationally disadvantaged." California State Dept. of Education, Guidelines: Compensatory Education 5 (Rev. 1972). The 2866 non-English speaking students of Chinese origin may thus more precisely be regarded as education-

ally disadvantaged youth. Respondents have identified 28,355 of the students enrolled in their schools in 1972-1973 as educationally disadvantaged youth or EDY. San Francisco Unified School Dist., Description of Federal & State Funded Projects 1972-1973, table following p. 31 (available at School District). State or Federally aided special educational services were provided to 24,698 EDY, or more than 85% of the total. When measured against this standard, once again the less than 40% of the non-English speaking Chinese EDY who receive special education is significantly smaller.

Even though education may not be a fundamental right in the constitutional sense, it is still:

"an opportunity, where the state has undertaken to provide it . . . which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

It is no great feat to perceive that regardless of whether non-English speaking Chinese are characterized as handicapped or disadvantaged, they are less likely to receive special education than those whose disability is not a function of national origin. Petitioners, who receive no special education, are the victims of such disparate treatment. We submit that unless respondents can justify their action on ethnically neutral grounds, they are constitutionally bound not to discriminate against petitioners in dispensing special educational services. *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944).

On this basis, it was error to rule against petitioners on the ground that, as a matter of law, no sufficient claim of deprivation of a constitutional right was presented. This

Court should hold that petitioners have established a prima facie case of constitutionally proscribed discrimination. Respondents should be required to demonstrate that some basis other than petitioners' Chinese origin wholly explains the fact that they are among the more than 60% of the non-English speaking students similarly situated who receive no special training in English, while respondents are providing special training responsive to the needs of all or most of the other handicapped and disadvantaged students in the district. Failing such proof, petitioners are entitled to relief.

CONCLUSION

For the reasons set forth above, we urge that the cause be reversed and remanded with directions that respondent school board show cause, if it has any, for its discrimination in failing to teach English to petitioners, and, in the absence of constitutionally sufficient justification, for the determination of appropriate remedies to eliminate such discrimination.

Dated: July 30, 1973.

W. REECE BADER

600 Montgomery Street
San Francisco, CA 94111

*Attorney for San Francisco
Lawyers' Committee for
Urban Affairs*

JAMES R. MADISON

600 Montgomery Street
San Francisco, CA 94111

Of Counsel

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SUPREME COURT, U. S.

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1972

No. 72-6520

Supreme Court, U. S.
FILED

AUG 2 1973

MICHAEL RODAK, JR., CLERK

KINNEY KINMON LAU, a Minor by and through
MRS. KAM WAI LAU, his Guardian ad Litem, et al.,
Petitioners,

VS.

ALAN H. NICHOLS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE
MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND
AMERICAN G. I. FORUM
LEAGUE OF UNITED LATIN AMERICAN CITIZENS
ASSOCIATION OF MEXICAN AMERICAN EDUCATORS

MARIO G. OBLEDO,
SANFORD J. ROSEN,
MICHAEL MENDELSON,
ALAN EXELROD,

145 Ninth Street,
San Francisco, California 94103,
Telephone: (415) 626-6196,

Attorneys for Amici Curiae.

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In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1972

No. 72-6520

**KINNEY KINMON LAU, a Minor by and through
MRS. KAM WAI LAU, his Guardian ad Litem, et al.,
*Petitioners,***

VS.

**ALAN H. NICHOLS, et al.,
*Respondents.***

**On Writ of Certiorari to the United States Court of Appeals
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**BRIEF OF AMICI CURIAE
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AMERICAN G. I. FORUM
LEAGUE OF UNITED LATIN AMERICAN CITIZENS
ASSOCIATION OF MEXICAN AMERICAN EDUCATORS**

INTEREST OF AMICI*

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1,

*The letters of Petitioners and Respondents, consenting to the filing of this brief amici curiae, have been filed with the clerk.

1968, primarily to provide legal assistance to Mexican Americans. It is headquartered in San Francisco with additional offices in San Antonio, Los Angeles, Denver, Albuquerque and Washington, D.C. A major goal of the organization since its inception has been to end educational deprivation to Spanish-speaking children. To this end, MALDEF is representing Spanish-speaking students in *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.M. 1972) and *Arvizu v. Waco Independent School District*, United States District Court for the Western District of Texas, C.A. No. W. 71-CA-56 (April 27, 1972), cases which present issues similar to those presented by Petitioners.

The American G.I. Forum is a social and fraternal organization composed primarily of Mexican Americans. It had its beginnings after World War II in the aspiration of returning Mexican American veterans to end the discriminatory social, economic, and political practices that pervaded this country. The organization now has chapters nationwide. One of the main goals of the Forum is the improvement of education. At the national level, it has strongly supported legislation such as the federal Bilingual Education Act, while locally, the chapters have moved school districts to institute programs to meet the needs of Mexican American children.

The League of United Latin American Citizens (LULAC) is also a social and cultural organization with a nationwide membership. Its history of fighting discrimination against Mexican Americans dates

back to the 1920s when it fought segregation in the Texas schools. High on LULAC's agenda is the goal of ending educational practices which do not reflect the needs of Mexican American students.

The Association of Mexican American Educators was formed in California eight years ago to improve the education offered the Mexican American. The membership is composed of administrators, teachers and community people who subscribe to this goal. Thirty-six chapters are now functioning. The Association has been active throughout California urging the adoption of programs which take account of the language needs of Mexican American children. Additionally, it has been actively encouraging the recruitment of more Mexican Americans for the teaching profession.

SUMMARY OF THE ARGUMENT

Amici curiae make the following argument:

There are today millions of Spanish-speaking students in this country, many of whom do not comprehend any English when they come to school. They will be the prime beneficiaries of a result favorable to Petitioners in this case.

The reasons why Spanish has flourished can be traced to the extensive movement of people back and forth across the United States border with Mexico, the forced social and economic isolation of Mexican Americans in this country and a desire by persons of Mexican origin to preserve their abilities in Spanish.

The schools, however, have failed to take account of the needs of Spanish-speaking children. In addition to lagging behind their peers, Spanish-speaking children have suffered psychological damage. The results of this failure are high drop out rates and low achievement.

The relief requested by Petitioners has gained the support of knowledgeable educators and concerned legislators. Spanish-speaking teachers and Spanish language materials are available to satisfy any order favorable to Petitioners. The cost of satisfying such an order is moderate and substantially less than the costs generated by this Court's desegregation decisions.

ARGUMENT

I

THE ETHNIC GROUP WHICH WILL BE PRIMARILY AFFECTED BY THE OUTCOME OF THIS LAWSUIT IS THE SPANISH-SPEAKING.

This suit was brought on behalf of approximately 1,800 non-English-speaking students of Chinese origin in the San Francisco Unified School District who are excluded from receiving the benefits of public school education. Such benefits are denied since the school system does not offer them instruction that allows them to participate in the school program. The issue before the Court is: Does the school district have an obligation under the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 to provide non-English-speaking

students with instruction that would enable them to benefit from classes taught in English.

This denial of an equal educational opportunity presently taking place in the Chinese community in San Francisco is but a microcosm of the situation facing Spanish-speaking communities in the United States today. From towns as diverse as Laredo, Texas to New York City, Spanish surnamed children come to school with little or no ability to speak the English language; with a cultural heritage entirely different than that of Anglo Americans.

The population statistics suggest the enormity of the problem. There are over nine million persons of Spanish origin in the United States¹. "The majority of Spanish origin persons live in households where Spanish is the current language, as 6.0 million of the 9.2 million persons of Spanish origin, or 65 percent, reported Spanish as the language currently spoken in their home . . . Among persons of Spanish origin who were 5 to 19 years old, 64 percent were living in homes where Spanish was the current language."²

The two Amici, the American G.I. Forum and the League of United Latin American Citizens, typify the concern of the Spanish-speaking community that non-English-speaking children are suffering and have suffered educational deprivation of profound consequences. As a result of this concern, changes in the

¹United States Department of Commerce, Bureau of the Census, *Persons of Spanish Origin in the United States: March 1973 and 1971*, Series P-20, No. 250, April 1973, p. 1.

²Ibid., p. 2.

law have been made that allow schools to provide their non-English-speaking students an equal educational opportunity. For example, state laws that prohibited the use of languages other than English in the classroom were repealed. Learning Programs that take account of the language differences were created by state and federal governments.³ Furthermore, the Department of Health, Education and Welfare has, pursuant to Title VI of the Civil Rights Act of 1964 enacted regulations that could prevent the educational harm suffered by the Chinese children in this case, and Spanish-speaking children throughout the country.⁴

Lack of effective enforcement of these regulations, as well as the voluntary nature of the state and federal programs have stymied broad-ranged progress. There are vast numbers of Spanish-speaking children who remain untouched by the available programs.⁵

Amici believe that the Equal Protection Clause compels school districts to provide instruction that non-English-speaking students understand; however, they will leave the formal legal arguments to the Petitioners and other amici. This brief will develop, for the Court, the reasons why large numbers of school children are Spanish-speaking, the nature of the educational deprivation faced by these children,

³See p. 19 *infra*.

⁴"Identification of Discrimination and Denial of Services on the Basis of National Origin," May 25, 1970, 35 Fed. Reg. 11595 (July 18, 1970).

⁵United States Commission on Civil Rights, *Mexican American Education Study, Report III, The Excluded Student*, 1972, p. 22.

and the ultimate effect on school districts of a decision in the instant case favorable to Petitioners.

II

A CONTINUED HEAVY IMMIGRATION FROM MEXICO COMBINED WITH A TENACIOUS MAINTENANCE OF CULTURAL HERITAGE BY MEXICAN AMERICANS HAVE RESULTED IN LARGE NUMBERS OF SPANISH-SPEAKING SCHOOL CHILDREN.

Mexican Americans, or Chicanos, as this ethnic group is also known, have settled predominately in the Southwest part of the United States. The five states of Texas, California, New Mexico, Arizona and Colorado, because of their proximity to the border, have absorbed most of the immigration from Mexico.⁶ More recently, however, Mexican Americans have migrated north to midwestern cities in search of work. The Southwest is no longer necessarily a way station. Immigrants from the interior of Mexico come directly north and consequently, there are many non-English-speaking children in schools in, for example, Chicago, Illinois and Lansing, Michigan.

Migration from Mexico came in three waves. Around the turn of the century, there was a relatively small number of immigrants who came to work in mining, railroad construction and other such laboring work.⁷ Immigrants from Asia supplied most of the labor employed in Southwestern agriculture at that time. The

⁶Grebler, Moore & Guzman, *The Mexican American People*, Free Press, 1970, p. 39.

⁷Grebler, *supra* note 6, p. 63.

major wave of Mexicans immigrated to this country during the turmoil of the Mexican revolution. They provided the population base for most present day Mexican American communities around the Southwest.⁸ Immigrants were also drawn to the United States by the prosperity of the 1920's. However, they were funneled into farm laboring type of work as the supply of Asian labor diminished.⁹ During this period, Mexicans comprised nearly 10% of the legal migration to the United States.¹⁰ The number of illegal immigrants that entered during this prosperous period of American history will never be known. During the depression, immigration decreased drastically. The 1950's once again saw a massive increase of emigration from Mexico to this country. In the second half of the 1950's, nearly 15% of all immigrants came from Mexico.¹¹ In addition, Congress reinstituted the "bracero" program at the urging of the agricultural interests, causing a great increase in temporary migrations.¹² However, the same conditions which argued for the use of "braceros"—low wages, poor working conditions, inadequate housing—made it attractive for American farmers to hire illegal aliens. As a result, there was also a flood of "wetbacks". The Immigra-

⁸Meier & Rivera, *The Chicanos: A History of Mexican Americans*, p. 135.

⁹*Mexicans in California*, Report of Governor C. C. Young's Mexican Fact-finding Committee 1930 (Reprint San Francisco, California 1970) p. 171.

¹⁰Grebler, *supra* note 6, p. 64.

¹¹Grebler, *supra* note 6, p. 67.

¹²The bracero program under Public Law 78 allowed contract labor to be brought from Mexico to the United States to do farm work during the appropriate growing and harvesting seasons.

tion and Naturalization Service reported that, in the early 1950's, 3.8 million illegal Mexican aliens were expelled from the United States.¹³ The number of illegal aliens who remained in the United States, again, will never be known; nor will the number of citizen-offspring born to the illegal aliens.

If this large mass of people had become integrated into American society as ethnic groups from Europe had, then the Spanish language, in all likelihood, would not have flourished. However, there are many reasons why the Mexican American has remained outside the American "Melting Pot".

First, there is a continuing Mexican cultural infusion because of the above described immigration.¹⁴ Recent immigrants speak only Spanish. They find that they are able to function effectively in Chicano communities without the necessity of learning English. Second, Mexican Americans have suffered the same type of social, economic and political discrimination as the black American. Schools have been segregated, *Keyes v. Denver School District No. 1*, 41 U.S. L. Week 5002 (June 21, 1973), *Cisneros v. Corpus Christi I.S.D.*, 459 F.2d 13 (5th Cir. 1972), *Mendez v. Westminster*, 161 F.2d 774 (9th Cir. 1948), see generally United States Commission on Civil Rights, *Mexican American Education Study, Report I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest*, April 1971. Political rights

¹³Grebler, *supra* note 6, p. 521.

¹⁴Grebler, *supra* note 6, p. 428.

have been denied, *Graves v. Barnes*, 343 F.Supp. 704 (W.D. Tex. 1972), *aff'd sub nom. White v. Regester*, 41 U.S. L. Week 4885 (June 18, 1973), *Castro v. State*, 2 Cal.3d 223 (1970). Employment discrimination has been the rule, *Roman v. Reynolds Metals Company*, — F.Supp. — (S.D. Tex. 1973), *NAACP v. Brennan*, U.S. District Court for the District of Columbia, No. 2010-72 (May 31, 1973). Social barriers were erected, perhaps epitomized by the separate wash-room facilities described in *Hernandez v. Texas*, 347 U.S. 475 (1954).

This discrimination has created a relatively insulated Mexican American community in large cities such as San Antonio, see *White v. Regester*, *supra*, and Los Angeles.¹⁵ Even in small towns "the barrio"¹⁶ tended to be isolated from the rest of the community.¹⁷ This cultural isolation has fostered retention of the Spanish language. Since children learn Spanish at home and do not socialize with English-speaking children at school, the need and opportunity to speak English is minimal.¹⁸ Third, there is, in the Chicano community, compared to other ethnic groups, a strong

¹⁵One author has characterized the Mexican American's position in Los Angeles as follows: "Unassimilated, unwelcome, and unprotected, these people were so thoroughly isolated that the American majority was able to maintain its untainted vision of an integrated community." Fogelson, Robert, *The Fragmented Metropolis: Los Angeles, 1850-1930*, Cambridge, Harvard University Press, 1967.

¹⁶"Barrio" is a Spanish word denoting a primarily Mexican American area analogous to ghetto.

¹⁷Manuel, H. T., *The Education of Mexican and Spanish-Speaking Children in Texas*, University of Texas, 1930, p. 18.

¹⁸Kibbe, Pauline, *Latin Americans in Texas*, Albuquerque, University of New Mexico, 1946, pp. 82-103.

desire to maintain the use of its mother tongue.¹⁹ Chicanos have always lived in the Southwestern United States. Their emigration from Mexico did not require a 3,000 mile journey across an ocean to a foreign place; at most, it was a 200 yard crossing of a river to a place that was once part of Mexico. Examples of the continued desire to hold on to Spanish are the numerous television and radio stations broadcasting in Spanish throughout the country and the importation of Spanish language films.

With this history of constant immigration, discrimination and isolation, the continued use of Spanish is understandable. A study conducted by the Mexican American Study Project at UCLA and later published in Grebler, et al, *The Mexican American People*, p. 425, reported that almost half of the sample of low income Mexican Americans in Los Angeles, and a greater percentage in San Antonio had trouble with English. Even in Minnesota, where there are few Mexican Americans, Spanish is spoken.²⁰ The census figures cited supra do not show Spanish-surnamed people who have difficulty with the English language, but they do reveal the extent to which all Spanish-surnamed people maintain their knowledge and use of Spanish.

In sum, the continued use of Spanish by Mexican Americans is a reality. The causes are varied, but in

¹⁹Blair, Bertha, Lively, Anne, & Trimble, Glen, *Spanish Speaking Americans*, National Council of Churches of Christ, p. 113.

²⁰Moquin, Wayne, *A Documentary History of the Mexican Americans*, Praeger Publishers, N.Y., 1971, p. 330.

large part they are attributable to the isolation that has been forced on this group by the dominant Anglo society. This isolation has, in part, contributed significantly to this group clinging to its cultural heritage to an extent greater than other ethnic groups. The American school system's failure to cope with this reality has perpetuated it. The results of this failure to cope is described in the following section.

III

THE LACK OF INSTRUCTION IN SPANISH FOR SPANISH-SPEAKING-CHILDREN IS, IN SIGNIFICANT PART, RESPONSIBLE FOR THE UNDERACHIEVEMENT OF MEXICAN AMERICAN STUDENTS.

There are large numbers of Spanish-speaking children who are now sitting mutely in classrooms because they do not understand the language used by the teacher. One knows intuitively that these children will learn nothing until they learn English. However, beyond this common sense understanding of the problem there are cogent educational reasons for teaching English to children in their native language. The first portion of this section will describe what happens to the child who is placed in this type of situation. The second portion will document the educational deprivation that has occurred in significant part as a result of these practices.

The exclusively Spanish-speaking child who comes to school and is taught only in English immediately falls behind his peers. He is unable to benefit from

the instruction offered by the school until he understands a language which is different from the language he has learned in his youngest years. This comprehension may sometimes take several years to develop. In the meantime, he is falling further and further behind. Some schools even add an extra grade to a child's school career because of differences in language. The United States Commission for Civil Rights Report II, *supra*, p. 36 found:

"Grade repetition is also related to the language problem of Mexican American students. In many schools of the Southwest, Mexican American children are frequently required to repeat the first grade until they are judged to have sufficient mastery of the English language to study their subjects in English."

Contrary to the specialized education physically handicapped children are given, which is meant to keep them at parity with other students, Spanish-speaking children lag behind educationally until *they* make the *extra effort* to learn a language—English—very unlike the one with which they are familiar.

Failure to provide Spanish language instruction damages the student not only educationally, but emotionally as well. Language is the dominant culture carrier for the Mexican American. As discussed above, there is a strong retention of this cultural heritage by Mexican Americans. When a child comes to school and finds a complete rejection of the dominant carrier of his culture, his self-esteem suffers. When a lack of formal instruction in Spanish is accompanied by

active discouragement of even the casual use of Spanish in the classroom, the child senses that what he brings to the classroom is valueless. Various commentators have described this problem in the following terms:

"The harm done the Mexican American child linguistically is paralleled—perhaps even exceeded—by the harm done to him as a person. In telling him that he must not speak his native language, we are saying to him by implication that Spanish and the culture which it represents are of no worth. Therefore, (it follows) the people who speak Spanish are of no worth. Therefore, (it follows again) this particular child is of no worth. It should come as no surprise to us, then, that he develops a negative self-concept—an inferiority complex. If he is no good, how can he succeed? And if he can't succeed, why try?"²¹

"The non-English-speaking child who has typically lived the critical first five or six years of his life in a language and a culture different from those he encounters as he enters school inevitably suffers a culture shock. To be sure, most administrators and teachers try their best—in English—to make such a child feel comfortable and welcome. However, to the extent that English is the only medium of communication and the child's language is banned from the classroom and playground, he inevitably feels himself to be a stranger. Only as he succeeds in suppressing his language and natural way of behaving, and in assuming a new and unaccustomed role, does he feel the full warmth of approval. In subtle or

²¹National Education Association, *The Invisible Minority*, Washington, D.C., 1966, p. 11.

not so subtle ways he is made to think that his language is inferior to English, that he is inferior to the English speaking children in school, and that his parents are inferior to English speakers in the community."²²

In sum, Spanish-speaking children are subjected to a dual effect; first, the school's failure to meet their language needs, and second, the psychological damage brought about as a result of the school's failure to meet their language needs. No doubt there are children who succeed in school in spite of a history of educational neglect; however, as the following paragraphs document, such neglect has taken its toll of the preponderance of Spanish-speaking children.

What have been the results of these practices? The evidence strikingly demonstrates that the American school system has failed the Mexican American. They are a group that has been excluded from full participation in the schools in almost every respect.

Mexican Americans, twenty-five years and older, in 1960, had a median years of school completed of 7.1 while the rate for Anglos was 12.1 and for nonwhites was 9.0.²³ The dropout problem was so severe in 1942 that one study reported that 43% of the Chicano school age children were not attending school; of these

²²Andersson, Theo. & Boyer, Mildred, *Bilingual Schooling in the United States*, Vol. 1, 1970, p. 43. See also Martinez, *Literacy Through Democratization of Education*, 40 *Harvard Education Review*, 1970, p. 280; Gaarder, *Teaching the Bilingual Child: Research, Development and Policy*, 49 *Modern Language Journal* 165, 168 (1965); Christian, *The Acculturation of the Bilingual Child*, 49 *Modern Language Journal* 160, 161 (1965).

²³Grebler, *supra* note 6, p. 150.

that were, 37,000 were in the second grade and only 6,000 were in the eighth.²⁴

Even today in the area of educational achievement Mexican Americans suffer. 64% of eighth grade Mexican American children in the Southwest are reading $\frac{1}{2}$ year or more below grade level while only 28% of Anglo children are in the same position.²⁵ In mathematics 57% of Mexican Americans in junior high school in Los Angeles are below or markedly below average. 23% is the equivalent figure for Anglos.²⁶

The failure of the schools is epitomized in the differences in attitude and interaction between Mexican Americans and Anglos on the part of teachers. The United States Commission on Civil Rights most recent report in its *Mexican American Education Study Series, Report V: Differences in Teacher Interaction with Mexican American and Anglo Students*, 1972, p. 43, makes the following conclusions:

"The basic finding of this report is that the schools of the Southwest are failing to involve Mexican American children as active participants in the classroom to the same extent as Anglo children. On most of the measures of verbal interaction between teacher and student, there are gross disparities in favor of Anglos.

²⁴Blair, *supra* note 19, p. 117.

²⁵United States Commission on Civil Rights, *Mexican-American Educational Series Report II: The Unfinished Revolution*, 1971, p. 100.

²⁶*Ibid.*, p. 90.

Thus teachers praise or encourage Anglo children 36 percent more often than Mexican Americans. They use or build upon the contributions of Anglo pupils fully 40 percent more frequently than those of Chicano pupils. Combining all types of approving or accepting teacher behavior, the teachers respond positively to Anglos about 40 percent more than they do to Chicano students. Teachers also direct questions to Anglo students 21 percent more often than they direct them to Mexican Americans. In addition, Mexican American pupils receive significantly less overall attention from the teacher, measured by the extent to which teachers address their students in a non-critical way. In light of these findings, it is not surprising to have also found that Mexican American children participate less in class than do Anglos; they speak less frequently both in response to the teacher and on their own initiative. The total picture that emerges from this study of classroom interaction is one in which Mexican American students are ignored compared to their Anglo counterparts."

These dropout rates, achievement disparities and teacher preferences are built upon a base of segregation in student placement. For many years schools were openly segregated.²⁷ Today, continued isolation characterizes schools in the Southwest.²⁸

²⁷Manuel, *supra* note 17, pp. 59, 62 and *Mendez v. Westminster*, *supra*.

²⁸United States Commission on Civil Rights, *Mexican American Education Study, Report I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest*, 1971, p. 60. *Keyes v. Denver School District No. 1*, 41 U.S. L. Week 5002 (June 21, 1973).

Several courts have considered the effects of failing to give Spanish speaking children some instruction in Spanish. They have determined that the effects are adverse and warrant judicial correction. In *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279, 1282 (D.N.M. 1972), the court accepted the opinion testimony of an educational psychologist who stated that difficulties in the English language accounted for 80% to 85% of the differences in achievement testing results between Chicanos and Anglos. It then held that Spanish-speaking children are entitled to an equal educational opportunity which shall include instruction in their mother tongue. Similarly, the district court stated in *United States v. State of Texas*, 342 F.Supp. 24, (E.D. Tex. 1971) when ordering a comprehensive bilingual and bicultural education plan to remedy a past history of segregation:

"... Mexican American students exhibit numerous characteristics which have a causal connection with their general inability to benefit from an educational program designed primarily to meet the needs of so-called Anglo Americans. These characteristics include 'cultural incompatibilities' and English language deficiencies—two traits which immediately and effectively identify those students sharing them as members of a definite group whose performance norm habitually will fall below that of Anglo-American students who do not exhibit these traits."

Even in the instant litigation the Court of Appeals stated that the sympathy of the lower court for the non-English-speaking Chinese children was well

founded, and that the relief requested by Petitioners was "commendable and socially desirable." 472 F.2d 911, 915 (9th Cir. 1973).²⁹

The Chicano has been denied equal educational opportunities in many aspects of his education. Like the Chinese students, he is only asking that at the early stages of his education in this country that he not be forced to fall behind because he does not know English. The results of the policies of the past have failed in this regard. Common sense should have warned us that they would. Common sense also tells us that educational deprivation will continue unless this Court acts.

IV

THE NEED FOR INSTRUCTION THAT WOULD PERMIT SPANISH-SPEAKING STUDENTS TO BENEFIT FROM CLASSES TAUGHT IN THE ENGLISH LANGUAGE HAS BEEN RECOGNIZED BY GOVERNMENTAL AGENCIES THROUGHOUT THE COUNTRY.

The Petitioners and Amici in this case have asked for relief which the states and the federal government sanction and encourage. Many of the existing govern-

²⁹Recent research indicates that a child's mother tongue is the best instrument for learning, especially in the early stages of school. It was found that non-national language speaking students taught in schools in which the mother tongue is distinct from the national language were used scored significantly better in reading comprehension of the national language than a similar group taught in the national language. Modiano, *National or Mother Tongue in Beginning Reading: A Comparative Study, Research in the Teaching of English*, Vol. II, No. 1 (April 1968), pp. 32-43. This conclusion is reflected in the educational policy of such bilingual countries as Canada, Finland, Belgium, Switzerland and the Union of South Africa.

ment supported programs, in fact, provide full time bilingual services to both English and non-English-speaking children, relief which is considerably more burdensome to school districts than that requested by Petitioners.

Congress has recognized the needs of non-English-speaking children when it created the Bilingual Education Act of 1967.

"In recognition of the special educational needs of the large numbers of children of limited English-speaking ability in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out new and imaginative elementary and secondary school programs designed to meet these special educational needs. For the purposes of this subchapter, "children of limited English speaking ability" means children who come from environments where the dominant language is other than English."²⁰

The states have also become aware of the language problem affecting many school children. Typical of the legislative findings in this regard is the legislative purpose clause of the California Bilingual Education Act, California Education Code §5761:

"The Legislature finds that there are large numbers of children in this state who come from families where the primary language is other than English. To determine more exactly the need in this area, an annual census is necessary. The in-

²⁰20 U.S.C. §880b.

ability to speak, read and comprehend English presents a formidable obstacle to classroom learning and participation which can be removed only by instruction and training in the pupils' dominant language. In many of the public schools an inordinately high percentage of pupils are unable to speak the English language. The Legislature further recognizes that high quality bilingual programs in the public schools would allow the acquisition by students of educational concepts and skills needed to improve the development of human resources in this state. The Legislature finds and declares that a primary goal of such programs is, as effectively and efficiently as possible, to develop in each child fluency in English so that he may then be enrolled in the regular program in which English is the language of instruction."

Each of the following states has a program encouraging at least the relief requested by Petitioners: Alaska Stats. §14.08.160; California Educ. Code §5761; Colorado Revised Stats. 1963 §123.21-3; General Stats. of Connecticut §10-17 et seq.; Smith Hurd Illinois Stats. Ann. Chap. 122 §10-20.8a; Maine Stats. Ann. Title 20 §102; Ann. Laws of Massachusetts Chap. 71A: 1 to 9; McKinney's Cons. Laws of New York Educ. §3204. The Alaska and Massachusetts statutes not only sanction but require that non-English-speaking children be given the kind of instruction they need to understand classes in English.

The responsiveness of these state legislatures to non-English-speaking children is indicative of the seriousness with which responsible legislators and edu-

enters reward their problems. However, this same concern has not permeated through to local school districts generally. 33% of the school systems in the Southwest continue to discourage the use of Spanish in the classroom.²¹

Others have instituted instruction in Spanish only after extensive community pressure. The same patterns and attitudes of prejudice that have resulted in segregation and discrimination against Chicanos in the past prevent the implementation of well recognized programs that would begin to insure equal educational opportunity.

V

GRANTING THE RELIEF REQUESTED BY PETITIONERS IS FINANCIALLY AND PHYSICALLY FEASIBLE

Although there are large numbers of non-English-speaking children in this country, the ability to offer them the instruction needed is well within our capabilities. In order to teach a child in a language other than English, the basic ingredient is a teacher who speaks that language. There are now many Chicanos with Spanish speaking ability who are graduating from American universities. If school districts would encourage them to use their knowledge of Spanish in the classroom, many of the problems discussed in this brief would be eliminated. There are also considerable numbers of Anglo teachers, particularly in

²¹U. S. Commission on Civil Rights, Mexican American Education Study, Report III, pp. 14-16.

the Southwest, who know Spanish but are discouraged from using it by school officials. Finally, under the Elementary and Secondary Education Act, 20 U.S.C. §241a, *et seq.*, funds are available for employing teachers aides. At least these non-credentialed personnel could bring Spanish into the classroom.

In addition to Spanish-speaking personnel, Spanish-English educational materials will be needed for bilingual classrooms. Fortunately, many materials have been developed by school districts funded to implement bilingual education programs under the Bilingual Education Act, 20 U.S.C. §880b. This fiscal year the Office of Education of the Department of Health, Education and Welfare has supported 217 bilingual projects with curriculum materials being produced by each. In order to make the products of these grants available to other interested school districts, the Office of Education has created the Bilingual Dissemination Center in Austin, Texas. Because of the work now accomplished, the educational establishment is ready to provide the materials necessary to satisfy a decision by this Court in favor of Petitioners.

There is also no indication that meeting the needs of non-English-speaking children would drain the public fisc. As a matter of common sense, it would cost no more to hire a teacher who speaks Spanish than one who does not. No additional floor space is needed for these children. The federal and state programs do provide monies for bilingual education but in most of these programs extra teachers are added

to faculties and extensive in-service teacher training takes place.

Furthermore, even if additional funds are required to provide the instruction necessary, the burdens are no heavier than those imposed by this Court in desegregation matters. Surely, if this Court could mandate desegregation and its attendant costs in population centers such as Denver, Colorado, *Keyes v. Denver School District No. 1*, 41 U.S. L. Week 5002 (June 21, 1973) and Charlotte, North Carolina, *Swann v. Charlotte Mecklenberg Board of Education*, 402 U.S. 1 (1971), it could require expenditures such as requested in the instant case.

CONCLUSION

This Court in *San Antonio Independent School District v. Rodriguez*, 36 L.Ed.2d 16, 37 (1973) held that the State of Texas was offering enough resources to its school districts for them to provide an adequate education. Even though less money was spent by some districts than others, all were receiving or raising enough to carry on an educational program. For non-English-speaking children within these districts, however, the adequate education standard is not being met. These children are not receiving any education until they learn English. School districts refuse to offer instruction in the native language that will foster a quick and emotionally healthy learning of English. The past failures of the school systems

in this regard are now apparent. They will not be corrected except under mandate from this Court.

Wherefore, Amici pray that this Court grant the relief requested by the Petitioners, reverse the judgment of the Court of Appeals and remand the case to the District Court with instructions that it enter appropriate relief.

Dated, July 27, 1973.

Respectfully submitted,

MARIO G. OBLEDO,

SANFORD J. ROSEN,

MICHAEL MENDELSON,

ALAN EXELROD,

Attorneys for Amici Curiae.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU,
a Minor by and through
MRS. KAM WAI LAU,
His Guardian ad Litem, *et al.*,

Petitioners,

v.

ALAN H. NICHOLS, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONERS

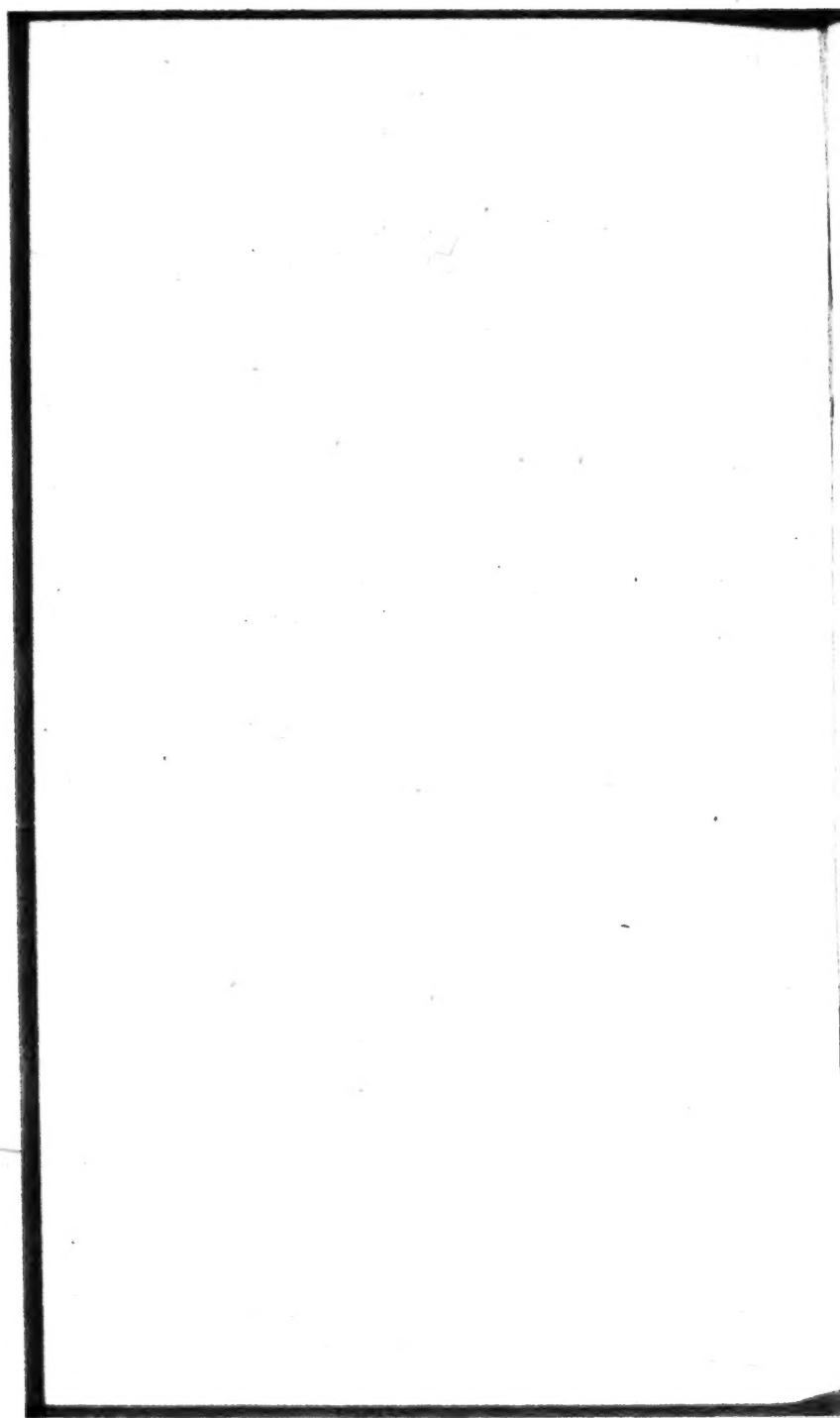
EDWARD H. STEINMAN
Assistant Professor
School of Law
University of Santa Clara
Santa Clara, CA 95053
(408) 984-4203

CLARENCE MOY
San Francisco Neighborhood
Legal Assistance Foundation
Chinatown-North Beach Office
250 Columbus Avenue
San Francisco, CA 94133
(415) 362-5630

KENNETH HECHT
Youth Law Center
795 Turk Street
San Francisco, CA 94102
(415) 474-5865

Attorneys for Petitioners

July 25, 1973



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU,
a Minor by and through
MRS. KAM WAI LAU,
His Guardian ad Litem, *et al.*,

Petitioners,

v.

ALAN H. NICHOLS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 116) is reported at 475 F.2d 909; a subsequent order of the Court of Appeals for the Ninth Circuit (App. 141, denying the request of a member of the Court of Appeals for *en banc* consideration of the instant case) is not yet reported. The order of the United States District Court for the Northern District of California (Civ. No. C-70-627 LHB, May 26, 1970) is not reported; it is set forth at pp. 113-115 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 8, 1973 (App. 116). On April 9, 1973, within ninety (90) days of the date of entry of judgment of the Court of Appeals, a petition for writ of certiorari was filed. This Court granted the writ on June 11, 1973. 93 S.Ct. 2786 (App. 140). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a school district, when it precludes non-English-speaking children of Chinese ancestry from any opportunity to obtain an education by refusing to provide any instruction that would permit them to comprehend and benefit from classes taught exclusively in the English language, violates the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Civil Rights Act of 1964.

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. §2000d):

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

This case also involves guidelines issued by the United States Department of Health, Education and Welfare [hereinafter referred to as "HEW"] concerning "Identification of Discrimination and Denial of Services on the Basis of National Origin" (35 Fed.Reg. 11595, July 18, 1970) which state, in pertinent part:

Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

The full guidelines are set forth at pp. 1a-3a of the Appendix attached to the instant Brief.

Section 71 of the California Education Code:

Language of instruction

English shall be the basic language of instruction in all schools.

The governing board of any school district and any private school may determine when and under

what circumstances instruction may be given bilingually.

It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that bilingual instruction may be offered in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is authorized to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

Pupils who are proficient in English and who, by successful completion of advanced courses in a foreign language or by other means, have become fluent in that language may be instructed in classes conducted in that foreign language.

Section 8573 of the California Education Code:

Requirements for high school graduation and diploma

No pupil shall receive a diploma of graduation from grade 12 who has not completed the course of study and met the standards of proficiency prescribed by the governing board. Standards of proficiency in basic skills shall be such as will enable individual achievement and ability to be ascertained and evaluated. Requirements for graduation shall include:

- (a) English.
- (b) American history.
- (c) American government.
- (d) Mathematics.
- (e) Science.
- (f) Physical education, unless the pupil has been exempted pursuant to the provisions of this code.
- (g) Such other courses as may be prescribed.

Section 12101 of the California Education Code:**Children between ages of 6 and 16 years**

Each person between the ages of 6 and 16 years not exempted under the provisions of this chapter is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory continuation education not exempted under the provisions of Chapter 7 (commencing at Section 12551) shall attend the public full-time day school or continuation school or classes for the full time for which the public schools of the city, city and county, or school district in which the pupil lives are in session and each parent, guardian, or other person having control or charge of such pupil shall send the pupil to the public full-time day school or continuation school or classes for the full time for which the public schools of the city, city and county, or school district in which the pupil lives are in session.

STATEMENT OF THE CASE

On March 24, 1970, petitioners — representative of 1,800 other non-English-speaking Chinese students in the San Francisco Unified School District — filed this lawsuit in United States District Court for the Northern District of California. They alleged that they were unable to speak, understand, read, or write English. They were thus completely excluded from receiving the benefits of public school education, in that no instruction was provided which would permit them to comprehend and benefit from all classes offered exclusively in the English language. Petitioners' complaint sought to require the San Francisco Unified School District [hereinafter referred to as "School District"] to provide such instruction so that non-English-speaking Chinese students could have access

to the educational opportunities offered to English-speaking students. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§1331 and 1343.

Since the educational barriers confronting non-English-speaking Chinese students were—and are—unfortunately clear, all parties stipulated to the essential facts. Pursuant to such stipulation, the District Court found that 2,856 Chinese-speaking students in the School District lacked an understanding of the English language.¹ Of these, the Court found that 1,790 non-English-speaking Chinese students were not provided any instruction that would permit them to comprehend and benefit from their classes taught in the English language.²

Moreover, there is also no issue in this case concerning the harms suffered by these non-English-speaking Chinese students. The School District has admitted without reservation that its failure to provide these children with English-language skills results in “their inability to understand the regular [school] work.”³ This, in turn, “inevitably” leads to “poor performance” in — and probable “dropout” from — school.⁴

On May 26, 1970, the District Court issued its order denying petitioners’ motions for injunctive and declaratory relief, and finding for the School District on the merits of the case. The Court found that

These Chinese-speaking students—by receiving the same education made available on the same terms

¹ *Lau v. Nichols*, Order, 2 (Civ. No. C-70-627 LHB, N.D. Calif. May 26, 1970) (App. 113).

² *Ibid.*

³ San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 3A (May 5, 1969), Plaintiffs’ Exhibit No. 5 (App. 101).

⁴ *Id.* at 6A (App. 103).

and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities.⁵

From this order petitioners appealed to the United States Court of Appeals for the Ninth Circuit. On January 8, 1973, the Court of Appeals for the Ninth Circuit issued its opinion affirming the judgment of the District Court (App. 116). One member of the original Court of Appeals filed a dissenting opinion (App. 131), and the majority decision provoked a request for rehearing *en banc* by a member of the Court of Appeals who was not a member of the original panel (App. 141). Though a rehearing *en banc* was denied (*ibid.*), the denial produced an additional dissent in the Court of Appeals (App. 141).

SUMMARY OF ARGUMENT

A. The right of students to an educational opportunity is not met merely through the illusion of equal treatment. The decisions of this Court consistently reaffirm that education is not just a matter of physical presence in a classroom. *E.g., Brown v. Board of Education*, 347 U.S. 483 (1954). Educational opportunities demand — at a minimum — that students be afforded access to an educational program from which they can benefit. Yet, under the decision of the Court of Appeals below, the Constitutional right to educational opportunity is satisfied merely by a school district providing students “with the same facilities, textbooks, teachers and curriculum as is provided to other children in the

⁵ *Lau v. Nichols*, Order, 3 (Civ. No. C-70-627 LHB, N.D. Calif. May 26, 1970) (App. 114-115).

district." *Lau v. Nichols*, 472 F.2d 909, 916 (9th Cir. 1973). For nearly 1,800 non-English-speaking Chinese students in San Francisco, however, such "equality" results in not only the absence of minimally "adequate education" (*San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1292 (1973)), but total foreclosure from any education. These students are denied any instruction which would permit them to comprehend and benefit from classes taught exclusively in the English language. By sanctioning such exclusion, the court below has implicitly determined that only English-speaking students are entitled to educational opportunities under the Equal Protection Clause.

B. The exclusion of non-English-speaking Chinese students from any educational opportunities stems directly from actions taken by the School District. The pervasive involvement of the School District — an agent of the State in providing education — in the discrimination suffered by these students includes compelling attendance at school (Cal. Ed. Code §12101), mandating English as the basic language of instruction (Cal. Ed. Code §71), and requiring knowledge of English to graduate from high school (Cal. Ed. Code §8573). Thus, for the court below to attribute the plight of these students to "deficiencies created by the appellants themselves in failing to learn the English language" (472 F.2d at 917 (App. 128-129)) is indeed — as the dissenting opinion below stated — "both callous and inaccurate." *Id.* at 922 (App. 138). Regardless of whether the School District caused the petitioners' English-language deficiency in the first place, it must provide non-English-speaking students with access to the benefits of an education. Myriad decisions of this Court firmly recognize that a violation under the Equal Protection Clause may be established where only the manifest effect of a particular action is discriminatory, quite apart from the

government's causation or intention. *E.g.*, *Bullock v. Carter*, 405 U.S. 134 (1972).

C. 1. Non-English-speaking Chinese students are members of a distinct ethnic, national origin group. Moreover, the distinction which triggers the inequalities suffered by them is one which ineluctably originates from their nationality: language. The resulting discrimination — based on a characteristic of national origin which this Court has considered a “suspect class” (*e.g.*, *Graham v. Richardson*, 403 U.S. 365, 372 (1971)) — must be subjected to strict judicial scrutiny, with such discrimination being justified only by an overriding substantive interest of the School District. No such interest has been alleged, let alone demonstrated, by the School District in this case.

2. Even under the “rational basis” standard of review, the discriminatory actions of the School District do not satisfy Constitutional standards. For the School District to operate a system of education which arbitrarily and capriciously withholds the tools of comprehension from a large minority of students furthers no legitimate state purpose.

D. Under Section 601 of the Civil Rights Act of 1964, discrimination on the basis of national origin is prohibited “under any program or activity receiving federal financial assistance.” 42 U.S.C. §2000d. Pursuant to HEW guidelines issued under this statute, school districts receiving such funds “must take affirmative steps to rectify the language deficiency” of students whose “inability to speak and understand the English language excludes [them] from effective participation in the educational program.” 35 Fed.Reg. 11595 (July 18, 1970). Though the School District receives extensive federal financial assistance, it has taken no affirmative steps to rectify the discrimination suffered by non-

English-speaking Chinese students. Such inaction constitutes a patent violation of federal statutory requirements.

ARGUMENT

I

THE SCHOOL DISTRICT'S REFUSAL TO PROVIDE NON-ENGLISH-SPEAKING CHINESE STUDENTS WITH INSTRUCTION THAT WOULD PERMIT THEM TO COMPREHEND AND BENEFIT FROM CLASSES TAUGHT EXCLUSIVELY IN THE ENGLISH LANGUAGE UNCONSTITUTIONALLY FORECLOSES THESE STUDENTS FROM ANY EDUCATIONAL OPPORTUNITY.

During the hearing on this case in the United States District Court, the District Court Judge made the following observation about the non-English-speaking Chinese petitioners:

[T]hey aren't students at all; they are just people, they are just bodies in the classroom [T]hey are named as students because it's convenient, but since they are not studying and they are not learning . . . you can't call them students.⁶

Unfortunately, the decisions of both the District Court and the Court of Appeals below condone the exclusion of these nearly 1,800 Chinese youngsters from "student" status. The result is the most severe type of discrimination — one that deprives these children of their rights to free speech and future political participation under the First Amendment and to due process and equal protection of the laws under the Fourteenth Amendment. Such discrimination also entails broad social, economic, and

⁶ Reporter's Transcript of May 12, 1970 hearing in *Lau v. Nichols* (Civ. No. C-70-627 LHB, N.D. Calif. May 26, 1970) at 18.

cultural consequences which will continue to exclude them from the mainstream of American life.

Ironically, the State of California recognizes the great importance of English for these non-English-speaking Chinese students⁷ at the very same time its agent — the School District — excludes them from the opportunity to acquire any English-language skills. California, like other states, has enacted laws requiring the compulsory attendance in school of children between specified ages.⁸ Similarly, since English is the dominant language in this society, California mandates that English be the sole or primary medium of instruction in the classes which these children must attend.⁹ For non-English-speaking students, the result can be viewed — were it not so tragic — as a parody: compulsory attendance laws force the presence of these students in a situation where they cannot possibly receive any benefit or learning. The attendant total exclusion of these students from any educational benefits flows naturally from this sad reality. While English-speaking students are free to raise their hands and ask questions, petitioners and other non-English-speaking students must sit in uncomprehending silence. While petitioners and their English-speaking classmates are given the same books and materials, for petitioners the pages are as if blank, the print conveying nothing.

⁷While fully endorsing the District Court's characterization of them as "not students" (see text accompanying note 6, *supra*), petitioners in this instant Brief will refer to themselves interchangeably as "students" for purposes of convenience and consistency with the description utilized in both the decisions below and other briefs filed in this case.

⁸Cal. Ed. Code §12101.

⁹Cal. Ed. Code §71. See also Section 8573 of the California Education Code, which imposes a mastery of English as a prerequisite to graduation from a public high school.

This situation of complete exclusion from any access to educational opportunity was recently contrasted by this Court with the conditions confronting the students-appellees in *San Antonio Independent School District v. Rodriguez*.¹⁰ In that case, the students alleged that the Texas school finance system discriminated against poor school districts, resulting in inadequate education being offered to children in those districts. The State of Texas (as appellant) contended that the financing system provided "at least an adequate program of education . . . [for] 'every child in every school district.'"¹¹ Focusing on the relative nature of the harm alleged by the students, this Court found the Texas financing system did provide a minimally adequate education for all students. In reaching this result, however, this Court observed that no argument was advanced in *Rodriguez* that "children in [relatively poorer districts] . . . are receiving no public education."¹²

Whatever merit appellees' argument might have if a State's [action] occasioned an absolute denial of educational opportunities to any of its children . . . no charge fairly could be made that the [financing] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.¹³

¹⁰93 S.Ct. 1278 (1973) [hereinafter referred to as "*Rodriguez*"].

¹¹*Id.* at 1292.

¹²*Id.* at 1291.

¹³*Id.* at 1299. Four years ago, this Court also suggested the Constitutional relevance of totally excluding children from access to any educational opportunities. *Shapiro v. Thompson*, 394 U.S. 613, 633 (1969) (stating that a school district could not save

In the instant case, non-English-speaking Chinese students charge precisely such an absolute denial of educational opportunity. More significantly, they have offered clear proof — including the admissions of the School District itself (see *infra* at pp. 15-16) — that they are denied access to even a minimally adequate education. Unable to communicate or understand the language of instruction, these students are foreclosed from any opportunity “to acquire the basic minimal skills” necessary to function in a classroom, let alone to enjoy “the rights of speech and of full participation in the political process.”¹⁴

monies by “barring indigent children from its schools”). See also *Hosier v. Evans*, 314 F.Supp. 316 (D.Vir.Is. 1971) (exclusion of aliens from public schools held violative of Equal Protection Clause) and *Ordway v. Hargraves*, 323 F.Supp. 1155 (D.Mass. 1971) (exclusion of pregnant students from regular classes held violative of right to educational opportunities).

¹⁴ *Rodriguez, supra*, 93 S.Ct. 1278, 1299. Though appellees-students’ First Amendment arguments in *Rodriguez* were rejected, this Court did explicitly recognize the obvious nexus between an individual’s ability to communicate and his exercise of free speech and voting rights. “We need not dispute . . . the proposition” raised by appellees-students that “[t]he ‘marketplace of ideas’ is an empty forum for those lacking basic communicative tools.” *Id.* at 1298. Since non-English-speaking students lack “basic communicative tools” in the language of this society, the “forum” of ideas is truly “empty” for them. In 1966, Fifth Circuit Judge Minor Wisdom made a similar observation in considering the impact of Federal statutes upon Louisiana laws prohibiting assistance to voters in the voting booth:

We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever.

United States v. Louisiana, 265 F.Supp. 703, 708 (E.D.La. 1966), *aff’d*, 386 U.S. 270 (1967).

See also *Garza v. Texas*, 320 F.Supp. 131 (W.D.Tex. 1970), where a federal court invalidated Texas laws prohibiting assistance to

The exclusion of non-English-speaking Chinese youngsters from any educational opportunities is admittedly not caused by the School District erecting physical barriers at the schoolhouse door. These children are permitted, indeed required, to sit — and languish — in regular classrooms for six hours a day. Yet, since the instruction in these classrooms is offered in a tongue unfathomable to these children, the result is not education but at best custodial supervision — confinement without rational basis. Nevertheless, the decision below holds that the Constitution can be satisfied by providing all students in San Francisco “with the same facilities, textbooks, teachers and curriculum.”¹⁵ Such a test accepts the illusion that educational opportunity results automatically from the receipt by all students of identical treatment. But, as Mr. Justice Frankfurter wrote two decades ago:

[T]here is no greater inequality than the equal treatment of unequals.¹⁶

By failing to recognize that education is not solely a matter of physical presence in a classroom, the majority decision below ignores the truth of Mr. Justice Frankfurter’s acute observation. The court below failed to recognize that education demands — at a minimum — that these 1,800 non-English-speaking Chinese students be afforded an opportunity to benefit from the offered

illiterate voters by election officials. Giving illiterate individuals the right to vote, the court said, is no

more than an empty ritual if the right itself does not include the right to be informed of the effect that a given physical act of voting will produce. *Id.* at 137.

¹⁵ 472 F.2d 909, 916 (App. 128).

¹⁶ *Dennis v. United States*, 339 U.S. 162, 184 (1950) (dissenting opinion).

educational curriculum. As aptly described in the dissenting opinion below,

the essence of education is communication: a small child can profit from his education only when he is able to understand the instruction, ask and answer questions, and speak with his classmates and teachers. When he cannot understand the language employed in the school, he cannot be said to have an educational opportunity in any sense.¹⁷

It is self-evident that a non-English-speaking Chinese student "cannot be said to have an educational opportunity equal to his fellow students unless and until he acquires some minimal facility in English."¹⁸ But this Court need not rely solely on what is obvious. The School District itself has admitted and recognized the educational deprivations suffered by petitioners. Significantly, the School District stipulated in the District Court below that 2,856 non-English-speaking Chinese students in the San Francisco school system lacked an understanding of the English language (App. 45). Of these non-English-speaking Chinese students, the School District admitted that 1,790 were not provided any instruction which would permit them to comprehend and benefit from their classes taught in the English language (App. 45).¹⁹

¹⁷ 472 F.2d 909, 919 (dissenting opinion) (App. 132).

¹⁸ *Ibid.*

¹⁹ The School District has described the situation confronting these nearly 1,800 non-English-speaking Chinese youngsters in different ways. For example, it has characterized them as students having "no knowledge of English" who must "learn English so that they can communicate with others and proceed normally with classroom work in our language." San Francisco Unified School District, *Bilingual Education in the San Francisco Unified School District* 1 (Nov 21, 1967) (App. 61). Elsewhere, the students

Moreover, the School District has acknowledged the grave harms and consequences to non-English-speaking Chinese students confronted with instruction in an alien tongue. In 1969, the School District stated:

When these [non-English-speaking Chinese] youngsters are placed in grade levels according to their age and are expected to compete with their English-speaking peers, they are frustrated by their inability to understand the regular work.²⁰

The results of such "inability to understand the regular work" are most immediate and direct.

For [these] children, the lack of English means poor performance in school. The secondary student is almost *inevitably doomed* to be a dropout and become another unemployable in the ghetto.²¹

The School District's admissions concerning the exclusion of non-English-speaking students from educational opportunity are strongly supported by the weight of

were described as "need[ing] special instruction in English" (App. 63); the School District also describes its own goal as having "the [non-English-speaking Chinese] student learn English to function in a regular classroom." Defendants' Answer to Interrogatory No. 5(e) (May 26, 1970) (App. 56).

Yet, whatever characterization is employed, the reality of the School District's candid admissions remains the same — thousands of non-English-speaking Chinese youngsters, unable to fathom the classroom work provided to them, are absolutely excluded from the educational process. As the School District itself recognizes, "the only hope" of overcoming this exclusion

lies in *adequate education*, vastly different in extent of services and in kind from what is available at present.

San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 6A (May 5, 1969) (emphasis added) (App. 104).

²⁰ *Id.* at 3A (App. 101).

²¹ *Id.* at 6A (emphasis added) (App. 103-104).

expert opinion throughout the country. Evidence indicates that children in grade school use language at an accelerating rate for purposes of problem-solving. Yet, the language in which these problems are solved is not available to petitioners. While petitioners' ideas are formed in a native tongue, they must be expressed in school in a language petitioners do not know and cannot use. Not only does problem solving become impossible, but a sense of failure, frustration, and inadequacy results — which leads to loss of interest and "inevitable" abandonment of education.²² Though experts have developed more than one method of teaching these youngsters, no support can be found for simply allowing non-English-speaking youngsters to languish in classes whose medium of instruction is exclusively tailored to educate English-speaking students, not them.²³

Petitioners share with all English-speaking children the capacity for learning and the acquisition and improvement

²² See, e.g., V. John and V. Horner, *Early Childhood Bilingual Education* (1971); J. Freely, "Teaching Non-English-Speaking First Graders to Read," in *Elementary English* 207 (1970); A. Anastasi and F. Cordova "Some Effects of Bilingualism upon the Intelligence Test Performance of Puerto Rican Children in New York City," 44 *Journal of Educational Psychology* 15 (1963); J. McNamara, "Effects of Instruction in a Weaker Language," 23 *Journal of Social Issues* 22, 132 (1967). For further discussion of such educational literature, see Brief Amicus Curiae of the Center for Law and Education, Harvard University, before the Supreme Court of the United States in support of the Petitioners on the Merits in *Lau v. Nichols* (July 1973).

²³ Thus, the observation in the majority decision below that "there is a dispute among the experts" as to the best method of teaching non-English-speaking youngsters (472 F.2d 909, 917, n. 17 (App. 129)) obscures the fact that petitioners in this case are not being provided with *any* instruction from which any educational benefits can be derived.

of skills. Yet, the actions of the School District, which the majority decision below sanctioned, guarantee that petitioners will never realize their potential. Moreover, the decision below misconstrues the scope of petitioners' Constitutional and statutory rights to an educational opportunity (which will be discussed throughout the remainder of this Brief, *infra*).²⁴ The decision below also ignores the train of consequences for further education, employment, civic participation, and in general an individual's life potential.²⁵ In view of these factors, the

²⁴The majority opinion also misstates the nature of the relief sought by petitioners. According to the majority decision, petitioners seek "bilingual compensatory education in the English language." 472 F.2d 909, 910 (App. 117). But as the dissenting opinion recognized, petitioners have "carefully and repeatedly abjured any such objective. . . . [P]laintiffs seek only that 'defendants . . . provide special instruction in English and that such instruction . . . be taught by bilingual teachers.'" *Id.* at 919 (App. 133). (In the petition before this Court, the latter claim for instruction taught by bilingual teachers is not being pursued.)

²⁵Even the School District recognizes that these factors are directly related to an individual's knowledge of English. In a report concerning non-English-speaking Chinese students, the School District described the Chinatown area of San Francisco, where most petitioners live, as "a slum as well as a ghetto." San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 4A (May 5, 1969) (App. 101).

In this ghetto one finds substandard housing, overcrowded living quarters, the highest TB and suicide rates in the city, severe unemployment and underemployment. Of the 40,000 residents, 40.6% are designated as poor by the Office of Economic Opportunity. Some 12.2% of the poverty rated families have an annual income of less than \$2,000. *Id.* at 2a (App. 100).

As the School District admitted, "[t]he low earning capacity of the residents [of this area] can be attributed to their lack of English." *Ibid.* (emphasis added).

The School District also cites 1960 United States Census data showing that the Chinatown area has "the lowest median of school

exclusion of 1,800 non-English-speaking Chinese children from any educational opportunities becomes even more intolerable.

years completed" in San Francisco. *Ibid.* The 1970 Census data reveal an equally dismal picture. These figures show that residents of San Francisco census tracts numbers 114 and 118 — which comprise that part of San Francisco commonly referred to as "Chinatown" — have completed a median of 5.6 school years as compared to 12.4 school years for San Francisco residents as a whole. U.S. Dept. of Commerce, *1970 Census of Population and Housing: Census Tracts: San Francisco-Oakland, Calif. Standard Metropolitan Statistical Area*, PHC(1) — 189 (1972). Similarly, only 20.9 percent of persons 25 years or older in Chinatown are high school graduates, as compared to 61.8 percent for all residents of San Francisco. *Ibid.*

Moreover, the 1970 Census data continue to reflect the "ghetto" conditions which the School District has recognized are endured by non-English-speaking Chinese students. While Chinese individuals make up approximately eight percent of San Francisco's total population, nearly 22 percent of the families in Chinatown live below poverty guidelines set by the United States government (as compared to 9.8 percent of all families in San Francisco). *Ibid.* Similarly, the median income of families in the Chinatown area is \$5,794, as compared to \$10,503 for San Francisco as a whole. *Ibid.* Finally, as an indice of Chinatown's substandard housing conditions, nearly 73 percent of the households in this area lacked some or all plumbing, as compared to only 14.4 percent of all households in San Francisco. *Ibid.*

Even a casual analysis of these 1970 United States Census data demonstrates why the School District has "assumed" Chinese children living in the Chinatown area "are from low income families . . . [which] have a mother tongue (Cantonese) other than English." San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 10 (May 5, 1969), Plaintiffs' Exhibit No. 5.

II

**THE DECISION BELOW WAS PREMISED ON
ERRONEOUS INTERPRETATIONS OF PETITIONERS'
CONSTITUTIONAL RIGHT NOT TO BE ARBITRARILY
DENIED AN EDUCATIONAL OPPORTUNITY.**

**A. The Equal Treatment of Unequals Does Not
Comport With the Requirements of the Equal
Protection Clause of the Fourteenth Amendment.**

The School District's equal treatment of all students within its system has resulted in the classification of pupils into two groups. One group — the approximately 90,000 English-speaking students who possess the language skills required to handle the English-taught public school curriculum — is provided educational opportunities. The other group, consisting of petitioners and thousands of other non-English-speaking Chinese students, is automatically foreclosed from such opportunities. That such a duality of treatment amounts to a discriminatory classification in violation of the Fourteenth Amendment guarantees of equal protection of the laws and equality of educational opportunities is manifest. Yet, the decision below excludes these non-English-speaking Chinese youngsters from the protection of the Fourteenth Amendment on the ground that the discrimination

is not the result of laws enacted by the State presently or historically, but the result of deficiencies created by the appellants themselves in failing to learn the English language.²⁶

In essence, the Ninth Circuit interprets the Equal Protection Clause as requiring a showing that the state

²⁶ *Lau v. Nichols*, 472 F.2d 909, 917 (App. 128-129).

caused petitioners' language disabilities or had a specific intent to discriminate. Absent such requisites, the Ninth Circuit holds a school district has no obligation to provide any meaningful educational opportunity to non-English-speaking children.

Besides being a "callous and inaccurate" description of petitioners' plight,²⁷ the Ninth Circuit's interpretation of the Equal Protection Clause is clearly erroneous.²⁸ There can be no doubt today that the Equal Protection Clause forbids not only different treatment of similarly situated persons, but also identical treatment of persons who are not similarly situated. In some cases, the inequality may occur in the form of disabilities caused by state action or of present differences which result from past state discrimination.²⁹ But, facially even-handed treatment by

²⁷ *Id.* at 922 (dissenting opinion) (App. 138).

²⁸ Significantly, the majority decision below offers no support for its view concerning the nature and scope of the Equal Protection Clause. *Id.* at 917 (App. 129).

²⁹ Though past intentional discrimination is not a requisite for invocation of the Equal Protection Clause (see pp. 25-27 of this instant Brief, *infra*), there is evidence of such past discrimination by the School District against Chinese-speaking students. "Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved in *Brown v. Board of Education* . . ." *Lee v. Johnson*, 404 U.S. 1215, 1215-1216 (1971) (per Douglas, J., as Circuit Justice on application for stay); see also *Lau v. Nichols*, Order Denying Request for En Banc Consideration, 4, n.3 (June 18, 1973) (dissenting opinion) (App. 145). Historical discrimination against Chinese students is documented in the Brief Amicus Curiae of the Center for Law and Education, Harvard University, before the Supreme Court of the United States in Support of the Petition for Writ of Certiorari in *Lau v. Nichols*, pp. 14-15 (April 1973).

a state can deny equal protection even where the present differences were neither created by the state nor the product of past discrimination.³⁰

The instant case is analogous to a hospital administering to all patients the same drug, which is helpful to some patients and harmful to others. The School District has similarly administered to all students instructional programs which benefit some students and harm, as the School District itself has admitted, others – the petitioners. The resulting exclusion of non-English-speaking Chinese students from any educational opportunities thus stems directly from actions taken by the School District.³¹ Yet, the Ninth Circuit gave no Constitutional weight to this significant state involvement because of the court's singularly narrow view of the ambit of the Equal Protection Clause. To the court below, equal protection guarantees can only be invoked when the petitioners' underlying disabilities – their English-language deficiency – were "caused directly or indirectly by any State action"³² or stem from intentional or purposeful discrimination by the School District.³³ But numerous decisions of this Court³⁴ require invocation of equal protection guarantees where the state's apparently even-

³⁰ E.g., *Bullock v. Carter*, 405 U.S. 134 (1972); *Mayer v. Chicago*, 404 U.S. 189 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

³¹ See subsection B of Point II, *infra*, at pp. 30-33 for a detailed discussion of this pervasive state action by the School District.

³² *Lau v. Nichols*, 472 F.2d 909, 916 (App. 127).

³³ *Id.* at 914 (App. 124).

³⁴ E.g., cases cited in note 30, *supra*. These cases will be discussed in notes 48-56 and the text accompanying those notes, *infra*.

handed action produced a discriminatory impact, quite apart from any State causation or intent.

The failure of the Ninth Circuit to consider and apply these decisions stems from its erroneous interpretation of this Court's decision in *Brown v. Board of Education*³⁵ that belies both the historical and logical essence of that case. To the majority below, *Brown* is satisfied merely by providing non-English-speaking Chinese students "with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district."³⁶ In fact, however, *Brown* was not satisfied with such mere superficial equality. The *Brown* decision itself shows this Court has looked beyond the surface equality of facilities and services to the crucial, often intangible, factors which go to make up a child's educational experience.³⁷ In piercing the surface equality of such "'tangible' factors,"³⁸ this Court in *Brown* relied on two earlier decisions which recognized that education in its essence involves much more than equal books, courses, and desks.

In the first case, *Sweatt v. Painter*,³⁹ this Court found that a newly established segregated law school was unequal to the University of Texas law school. The Court reached this decision, in part, because black students were being isolated from the creative intellectual life of the older white school. "Few students . . . would choose to study in an academic vacuum, removed from the interplay of ideas and exchange of views. . . ." ⁴⁰ Similar-

³⁵ 347 U.S. 483 (1954).

³⁶ *Lau v. Nichols*, 472 F.2d 909, 916 (App. 128).

³⁷ *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).

³⁸ *Ibid.*

³⁹ 339 U.S. 629 (1950).

⁴⁰ *Id.* at 634 Petitioners in the instant case have been thrust into a similar "academic vacuum" since they are unable to communicate with their teachers or fellow students.

ly, in the other case, *McLaurin v. Oklahoma State Regents*,⁴¹ the fact that a black graduate student "uses the same classroom, library and cafeteria as students of other races"⁴² did not deter this Court from finding equal protection violations. As explained in *Brown*, the *McLaurin* decision focused on the impairment of

intangible considerations: "... [the student's] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."⁴³

The *McLaurin* decision concluded that "the result"⁴⁴ of such impairment was the denial of educational opportunities. Yet, the Ninth Circuit has concluded that this same denial of educational opportunities, as suffered by petitioners in this case, is Constitutionally irrelevant.⁴⁵

The mere surface equality of "facilities, textbooks, teachers and curriculum"⁴⁶ in the instant case cannot mask the absolute impairment of non-English-speaking Chinese students' ability to function in their classroom society. Indeed, the "academic vacuum" and educational deprivations confronting petitioners are more severe than those in *Brown*, *Sweatt*, and *McLaurin* — for at least students in those cases could understand their teachers, fellow students, and the materials of instruction. On the other hand, petitioners

are more isolated from equal educational opportunity than were those physically segregated blacks

⁴¹ 339 U.S. 637 (1950).

⁴² *Id.* at 640.

⁴³ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

⁴⁴ 339 U.S. 637, 641.

⁴⁵ *Lau v. Nichols*, 472 F.2d 909, 912-915 (App. 120-125).

⁴⁶ *Id.* at 916 (App. 128).

in *Brown* [since non-English-speaking Chinese] children cannot communicate at all with their classmates or teachers.⁴⁷

The School District in the instant case cannot thus avoid the proscriptions of the Fourteenth Amendment by denying any blame for creating petitioners' English-language deficiency. Nor can the School District escape the mandate of this Court's decisions by claiming that it treats all students identically. Providing non-English-speaking Chinese students with the same medium of instruction as English-speaking students does not constitute either neutral or even-handed treatment when the medium is tailored to serve only English-speakers and not petitioners. Since School District actions have a severe discriminatory impact on these non-English-speaking Chinese students, they must be held violative of petitioners' right to equal educational opportunities. As stated last year, this Court determines such constitutional violations by focusing

upon the effect — not the purpose or motivation — of a school board's action The existence of a permissible purpose cannot sustain an action that has an impermissible effect.⁴⁸

⁴⁷ *Lau v. Nichols*, Order Denying Request for En Banc Consideration, 2 (June 18, 1973) (dissenting opinion) (App. 142-143).

⁴⁸ *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972). Similar language appears in *Hunter v. Erickson* (393 U.S. 385 (1969)), where this Court pierced a housing ordinance which appeared neutral but, in reality, burdened minority groups. This Court stated

Moreover, though the law on its face treats Negro and white, Jew and gentile, in an identical manner, *the reality* is that the law's impact falls on the minority. *Id.* at 391 (emphasis added).

Moreover, in areas outside the educational field, this Court has consistently granted relief under the Equal

Cf., Committee for Public Education and Religious Liberty v. Nyquist, 93 S.Ct. 2955, 2962 (1973), where this Court analyzed the realistic effect of which "nonpublic schools . . . would benefit from" New York laws providing financial assistance to nonpublic elementary and secondary schools.

This Court's practice of focusing on the discriminatory effect of a particular action is not of recent origin. *E.g., Baker v. Carr*, 369 U.S. 186, 226 (1962); *Oyama v. California*, 332 U.S. 633, 639 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). (As in the instant case, the discrimination in both *Oyama* and *Yick Wo*, *supra*, was based upon the respective petitioners' national origin of Japanese and Chinese ancestry. The significance of this "national origin" discrimination will be discussed in Point III, subsection A, *infra*.)

Moreover, lower federal courts have implemented this principle in a variety of contexts. Mr. Justice Clark, sitting by designation, has stated the rule as follows:

Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its [minority] citizens under a severe disadvantage which it cannot justify.

Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971).

See also *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Board of Examiners*, 438 F.2d 1167 (2d Cir. 1972); *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.Mex. 1972). As recently stated by the Fifth Circuit, *en banc*, in disposing of a petition for rehearing in *Hawkins v. Town of Shaw*, *supra*, at 1172-1173:

In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials. We feel that the law on this point is clear, for "equal protection of the laws" means more than merely the absence of governmental action designed to discriminate; . . . 'we now firmly recognize that the *arbitrary quality of thoughtlessness* can be as disastrous and unfair to

Protection Clause against discrimination resulting from inequalities for which the state was in no way responsible.⁴⁹ Many of these cases deal with the obligation of the state to provide special services to criminal defendants who are unable to pay for such services themselves.⁵⁰ In all these criminal cases, this Court held that a person's poverty may not be the basis for denying him the same opportunities to defend against criminal charges as are enjoyed by those who can afford the necessary services. This Court required the state in each of these cases to redress the inequality without regard to whether the state in some way caused the inequality in the first place.⁵¹

Significantly, the duty of a state to recognize differences between individuals, even when not initially responsible for those differences, was imposed by the United States Court of Appeals for the Second Circuit in a case where English-language barriers confronted a criminal

private rights and to public interest as the perversity of a wilful scheme.' (Citation omitted) (emphasis theirs).

⁴⁹ E.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (discrimination in housing); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (discrimination in voting).

⁵⁰ E.g., *Mayer v. Chicago*, 404 U.S. 189 (1971); *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁵¹ The majority decision below distinguishes these criminal cases on the ground that

the ability of a convict to pay a fine or a fee imposed by the state, or to pay a lawyer, has no relationship to the purposes for which the criminal judicial system exists.

Lau v. Nichols, 472 F.2d 909, 916 (App. 127).

Initially, it must be pointed out that this description of the rationale employed in these criminal cases is not accurate. This

defendant.⁵² In that case, a Spanish-speaking man was tried in a New York City criminal court in which neither his lawyers, his accusers, the witnesses, or officers of the court spoke any Spanish. The non-English-speaking defendant received only "spasmodic and irregular" translations⁵³ of the proceedings against him, with such translations being conducted by an interpreter employed by the prosecution.

In upholding the granting of a writ of *habeas corpus*, the Court of Appeals observed that "[t]o Negron, most of the trial must have been a babble of voices."⁵⁴ It further observed that, while Negron was accorded all the rights given other criminal defendants, he was in effect given no meaningful opportunity to participate in his trial.

Not only for the sake of effective cross examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded.⁵⁵

Court subjected the discrimination in many of these cases to the most strict judicial scrutiny rather than the more general "rationale basis" standard of review. *E.g.*, *Mayer v. Chicago*, *supra*, and *Griffin v. Illinois*, *supra*. More importantly, the decision below fails to recognize that the purpose for which an educational system exists is to educate students, not to fail to do so. As in the criminal cases, the employment of any means which deprive thousands of students of any educational opportunities equally "has no relationship to the purpose for which the [educational] system exists." *Lau v. Nichols*, 472 F.2d 909, 916 (App. 127). See Point III, subsection B, *infra*, for a fuller discussion about how the School District's discriminatory actions do not even satisfy the "rational basis" standard of review.

⁵² *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970).

⁵³ *Id.* at 388.

⁵⁴ *Ibid.*

⁵⁵ *Id.* at 390.

The Constitutional claim advanced by Negron — and the remedy afforded him — are not different in kind from those sought in this case. Both Negron and the instant petitioners face discrimination against them because of their inability to understand English. For Negron, the failure of the State to provide him a translator produced the ensuing discrimination. For petitioners, the similar failure of the School District to provide them access to translation, which would let them understand and benefit from the English-language curriculum, has caused the discrimination that totally excludes them from the educational process. As the *Negron* court stated:

Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of [a non-English-speaking person].⁵⁶

That language barrier is equally crippling — let alone violative of Constitutional protections — to non-English-speaking Chinese students who cannot understand the only language spoken and used at school. Yet, the court below has employed its misconceived interpretation of equal protection guarantees to completely exclude such youngsters from receiving any educational benefits. In so doing, the court below reached a most singular, drastic, and Constitutionally erroneous conclusion — that children who are not out of the same mold as the norm can effectively be excluded from any educational opportunities.⁵⁷ The Ninth Circuit's metaphor of the "starting

⁵⁶ *Ibid.*

⁵⁷ Every student brings to the starting line of his educational career different advantages and disadvantages . . . created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the [School District] of educational opportunities within the

line" of educational careers is particularly inappropriate, since the School District has ensured that non-English-speaking Chinese students will never reach that line.

In essence, the identical treatment of English and non-English-speaking students by the School District is analogous to "the fabled offer of milk to the stork and the fox," which was cited by this Court in *Griggs v. Duke Power Co.*⁵⁸ As in the fable, identical treatment in this case does

not provide equality of opportunity. . . . [The School District must] provide that the vessel in which the milk is proffered be one all seekers can use.⁵⁹

B. The Exclusion of Petitioners from Any Educational Opportunity Stems Directly from Actions Taken by the School District.

The Court of Appeals' erroneous belief that the School District must cause or intend petitioners' English-language disabilities is coupled with a parallel misconception concerning the pervasive state action in this case. In reaching its decision, the court below found that the discrimination suffered by petitioners stemmed from their failure to learn English before reaching the school-house and not from any state action by the School District.

meaning of the Fourteenth Amendment should the [School District] fail to give them special attention, this even though they are characteristic of a particular ethnic group. *Lau v. Nichols*, 472 F.2d 909, 915 (App. 126).

⁵⁸ 401 U.S. 424 (1971).

⁵⁹ *Id.* at 431.

Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system.⁶⁰

For purposes of equal protection analysis, however, the issue is not what advantages or disadvantages petitioners bring to the starting line, but whether the rules of the race — while benefitting some students — ensure that non-English-speaking Chinese students cannot successfully compete. And it is the School District that has actively, and knowingly, made the rules which guarantee that non-English-speaking Chinese students will compete against all other children with an insurmountable burden — lack of knowledge of English.

Contrary to the characterization in the decision below, the School District has not played a passive role in regard to non-English-speaking Chinese students. First, it is the State which imposes, and the School District which enforces, the requirement that these children go to school and attend classes whose content is wholly incomprehensible to them.⁶¹ The stark irony is that non-English-speaking Chinese children are thus compelled to attend schools which absolutely fail to educate them. Moreover, it is the School District which effectuates the legal mandates requiring English as “the basic language of instruction in all schools”⁶² and requiring a mastery of English to graduate high school⁶³ — requirements which are of no value to non-English-speaking Chinese children.

⁶⁰ *Lau v. Nichols*, 472 F.2d 909, 915 (App. 126).

⁶¹ Cal. Ed. Code §12101.

⁶² Cal. Ed. Code §71.

⁶³ Cal. Ed. Code §8573.

The School District, in essence, has chosen a curriculum which guarantees that non-English-speaking Chinese students will not receive any educational opportunities. In a recent similar case, a federal district court in New Mexico found such conduct by a school system constituted state action.⁶⁴ The federal court held that the school system denied an educational opportunity to Spanish-surnamed students by providing educational programs which benefitted only English-speaking students. In reaching this result, the court disposed of the school system's argument that the discrimination suffered by Spanish-surnamed children was "not the result of state action."⁶⁵

The promulgation and institution of a program by the Portales school district which ignores the needs of [Spanish-speaking minority] students does constitute state action.⁶⁶

Through its incontrovertibly active role, the School District in the instant case has created two classifications of students. One class consists of students from English-speaking backgrounds who are able to comprehend the language of the classroom. The other class is composed of non-English-speaking students who neither understand the language of instruction nor are given any help in learning that language. These classifications — and the resulting discrimination — become operative only through explicit choices, decisions, rules, and practices of the

⁶⁴*Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.Mex. 1972).

⁶⁵*Id.* at 1282.

⁶⁶*Id.* at 1283.

School District. As stated in the dissenting opinion from the denial of an *en banc* hearing in the Ninth Circuit:

The pervasive involvement of the state with the very language problem challenged forbids the majority's finding of no state action.⁶⁷

III

THE DECISION BELOW FAILED TO EXERCISE THE STRICT JUDICIAL SCRUTINY REQUIRED WHEN PRIMA FACIE DISCRIMINATION EXISTS AGAINST MEMBERS OF A DISTINCT ETHNIC AND NATIONAL ORIGIN GROUP.

A. Since the Disabilities Suffered by Petitioners Are Based Upon the "Suspect Classification" of Their Ethnicity and National Origin, This Court Must Invoke the Closest Judicial Scrutiny, Under Which the School District Can Show No Legitimate or Substantive Interest To Justify the Discrimination.

As a result of its singular view of the Equal Protection Clause, the Ninth Circuit decision below is not clear concerning what standard of review, if any, was utilized to test petitioners' claim of total denial of educational opportunities. Though never explicitly explained, the decision apparently employed the traditional rational

⁶⁷*Lau v. Nichols*, Order Denying Request for En Banc Consideration, 3 (June 18, 1973) (dissenting opinion) (App. 143). In support of its finding of School District state action, this dissenting opinion relied on four cases decided by this Court — *Bullock v. Carter*, 405 U.S. 134 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948); and *Nixon v. Condon*, 286 U.S. 73 (1932). *Ibid*. The respective amount of state action in each of these cases was in no way as pervasive or substantial as the involvement of the School District in the discrimination suffered by non-English-speaking Chinese students. Nevertheless, this Court found there was sufficient state action in each of these four cases for purposes of redressing discriminatory violations under the Fourteenth Amendment.

basis standard of review.⁶⁸ As will be shown in subsection B of Part III, *infra*, the School District has adopted and perpetuated a classification which cannot pass muster even under the rational basis test enunciated in such cases as *McGowan v. Maryland*⁶⁹ and *Williamson v. Lee Optical of Oklahoma*.⁷⁰ Yet, since the discrimination against petitioners is based upon the "suspect classification" of their ethnicity and national origin, it must be subjected to the most strict judicial scrutiny;⁷¹ this Court's recent decision in *San Antonio Independent School District v. Rodriguez* reaffirms this constitutional mandate of such close scrutiny.⁷²

The charge by non-English-speaking Chinese students that the School District is discriminating against them on the basis of national origin⁷³ does not stem solely from the fact that the District's actions have an unequal effect on an identifiable racial and ethnic minority. For, as the School District itself recognizes (see pp. 15-16, 18, *supra*), the distinction which triggers the inequality suffered by petitioners is one which intimately originates from their nationality: language. The language of any group is an index of its major characteristics. The reason petitioners

⁶⁸ *Lau v. Nichols*, 472 F.2d 909, 916, 917 (App. 127, 129).

⁶⁹ 366 U.S. 420 (1961).

⁷⁰ 348 U.S. 483 (1955).

⁷¹ *E.g.*, *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Oyama v. California*, 332 U.S. 633, 644-646 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

⁷² 93 S.Ct. 1278, 1294 (1973).

⁷³ The Ninth Circuit decision states that petitioners have never alleged any discrimination on the basis of national origin. *Lau v. Nichols*, 472 F.2d 909, 917 (App. 129). Such a statement,

thus speak Chinese and not English is that their national origin and ethnic identity is Chinese. Clearly then, the source of petitioners' educational deprivation lies in the School District's choice of English as the medium of classroom instruction, coupled with its failure to provide any language instruction to non-English-speaking Chinese children burdened by that choice. The discriminatory classification erected — between school children who receive instruction in a language they understand and those who do not — inevitably excludes non-English-speaking Chinese students from any educational opportunities. Since these severe educational harms result from a language distinction which coincides precisely with a fundamental characteristic distinguishing nationalities, the discrimination becomes one even more sharply based on national origin.⁷⁴

The decision by this Court in *San Antonio Independent School District v. Rodriguez* serves to reinforce petitioners' claim of discrimination on the basis of national origin. In *Rodriguez*, this Court rejected the contention that Texas' school financing scheme discriminated against poor individuals on the basis of the

however, contravenes the explicit allegations in Petitioners' Complaint and, specifically, their Fourth Cause of Actions (App. 18-19).

The majority decision's erroneous statement concerning petitioners' claim of national origin discrimination is compounded by its failure to recognize the strict standard of review which such discrimination requires from a court. The decision below states that the actions of the School District do not fall "within the meaning of the Fourteenth Amendment ... these even though [petitioners] are characteristic of a particular ethnic group." 472 F.2d 909, 915 (App. 126). The cases of this Court cited in note 71, *supra*, directly contradict such treatment of a "particular ethnic group" alleging discriminatory actions.

⁷⁴See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Clearly, their linguistic and cultural characteristics identify

"suspect classification" of wealth.⁷⁵ In so doing, it described the "traditional indicia of suspectness" which require the invocation of strict judicial scrutiny:

[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of

Chinese petitioners in both the school and community as surely as black skin color identifies black children. Thus, what a federal district court found for Mexican-American Spanish-speaking children suffering ethnic-based discrimination in Texas applies equally to the Chinese petitioners:

[These] students exhibit numerous characteristics which have a causal connection with their general inability to benefit from an educational program designed primarily to meet the needs of so-called Anglo-Americans. These characteristics include 'cultural incompatibilities' and English language deficiencies — two traits which immediately and effectively identify those students sharing them as members of a definite group whose performance norm habitually will fall below that of Anglo-American students who do not exhibit these traits. It would appear, therefore . . . that it is largely these ethnically-linked traits . . . which account for the identifiability of Mexican-American students as a group and which have, as a consequence, elicited . . . the different and often discriminatory treatment. . . .

United States v. Texas 342 F.Supp. 24,26 (E.D.Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

⁷⁵This Court cited two reasons why the disadvantaged individuals in *Rodriguez* were not "susceptible to identification" as a suspect class:

[T]he absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education.

San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278, 1292.

Regardless of whether wealth is a suspect classification, the national origin discrimination suffered by petitioners clearly is. Similarly, unlike the factual situation in *Rodriguez*, petitioners

political powerlessness as to command extraordinary protection from the majoritarian political process.⁷⁶

That individuals of Chinese ancestry like petitioners fall within such "indicia of suspectness" cannot be disputed.⁷⁷ In fact, the doctrine of such "extraordinary [Constitutional] protection" was articulated by this Court nearly 100 years ago in a case involving Chinese residents of San Francisco.⁷⁸ There, this Court found that the "actual operation" of San Francisco's laundry licensing ordinance was to deny Chinese laundrymen equal protection of the laws.⁷⁹ Recognizing the "political powerlessness" of such individuals, this Court did not hesitate then — nor has it since — to look behind a facially neutral state action when the burden of such action is felt by one particular ethnic or national origin group. Thus, when Chinese-speaking merchants 40 years after *Yick Wo* challenged a Philippines ordinance as being

have shown an absolute denial of educational opportunities. In *Rodriguez*, this Court said "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal [educational] skills." *Id.* at 1299. In the instant case, non-English-speaking Chinese students have not just demonstrated the relative denial of educational opportunities, but the complete absence of any such opportunities.

⁷⁶93 S.Ct 1278, 1294 (1973).

⁷⁷See, e.g., note 29, *supra*, concerning the "history of purposeful unequal treatment" (*ibid.*) to which Chinese individuals in this country have been subjected. Such treatment, which burdened them in business as well as schools, often focused on their language in imposing discrimination. For example, until the current version of California Education Code §71 was enacted in 1967, the teaching by languages other than English was prohibited in California. See, e.g., 1943 California Education Code §8251.

⁷⁸*Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁷⁹*Id.* at 373.

discriminatory against them, this Court gave close scrutiny to their claim.⁸⁰ Like petitioners in the instant case, these Chinese merchants asserted that the governmental discrimination arose because they could neither speak nor write any language except Chinese. The ordinance in the *Yu Cong Eng* case required the keeping of business account books in the Philippines in English, Spanish, or a local dialect. Despite the obvious usefulness of the ordinance in assisting local tax collection and auditing, this Court focused on the discriminatory impact which the ordinance had on Chinese-speaking merchants and found such discrimination denied them equal protection of the laws.

Cases involving other national origin groups confirm that the Chinese petitioners are members of an ethnic minority entitled to close judicial scrutiny.⁸¹ They constitute, as this Court has recognized since its 1886

⁸⁰ *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

⁸¹ E.g., *White v. Regester*, 93 S.Ct. 2332 (1973), where this Court reaffirmed that Mexican-Americans constitute an identifiable ethnic group for purposes of Fourteenth Amendment protection. Like the non-English-speaking Chinese petitioners, "[t]he typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult." *Id.* at 2340. See also *Keyes v. School District No. 1, Denver*, where this Court not only confirmed the status of Mexican-Americans as an identifiable ethnic group, but also recognized that they — like the Chinese petitioners — "suffer from the same educational inequities as Negroes and American Indians." 93 S.Ct. 2686, 2692 (1973).

Recognition of ethnic distinctiveness and identifiability of the Chinese minority has also been made by numerous governmental agencies — including the School District itself. See, e.g., pp. 15-16,

decision in *Yick Wo v. Hopkins*,⁸² "a discrete and insular minorit[y against whom] the operation of those political processes ordinarily to be relied upon to protect minorities [has been] curtail[ed]."⁸³

Petitioners thus fall directly within the ambit of the special judicial protection accorded "suspect classes." Therefore, the discrimination by the School District against these non-English-speaking Chinese students must "withstand the strict judicial scrutiny that this Court has found appropriate . . . [when] suspect classifications" are

supra, of the instant Brief. Moreover, even the Ninth Circuit below recognized that the Chinese petitioners' lack of English-language skills is "characteristic of a particular ethnic group." *Lau v. Nichols*, 472 F.2d 909, 915 (App. 126). Yet, since many Chinese students in San Francisco schools do understand English, the opinion concurring in the rejection of Ninth Circuit *en banc* consideration of this case indicated petitioners should not be given the special protection traditionally shown ethnic group members. *Lau v. Nichols*, Order Denying Request for En Banc Consideration, 7 (June 18, 1973) (concurring opinion) (App. 147). It is hardly surprising that no support was offered for this unique observation. This Court has never required that the discriminatory impact of a state action fall equally on all members of an ethnic group. The fact that petitioners represent thousands of non-English-speaking Chinese students in San Francisco alone constitutes a sufficient showing of widespread discrimination which requires this Court's closest attention.

⁸² 118 U.S. 356 (1886).

⁸³ *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938). This statement in *Carolene Products* was recently cited with approval and applied by this Court in *Sugarman v. Dougall*, where this Court invoked "a more searching judicial inquiry" (*United States v. Carolene Products Co.*, *supra*, *ibid.*) to discrimination suffered by aliens. 93 S.Ct. 2842, 2847 (1973).

involved.⁸⁴ Strict scrutiny, according to the *Rodriguez* decision,

means that the State's [action] is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'least drastic means' for effectuating its objectives.⁸⁵

Clearly, the School District in this case can not meet such a test. In fact, throughout this entire case, the School District has never alleged — let alone shown — any legitimate or substantive interest to satisfy its "heavy burden of justif[ying]" its exclusion of petitioners from any educational opportunity.⁸⁶ Since no such justification does or could exist, the discrimination suffered by these non-English-speaking Chinese students must be found violative of Fourteenth Amendment equal protection guarantees.

B. The School District Has Shown No Rational Basis for Excluding Non-English-Speaking Chinese Children From an Educational Opportunity.

⁸⁴*San Antonio School District v. Rodriguez*, 93 S.Ct. 1278, 1287.

⁸⁵*Id.* at 1288.

⁸⁶Through its silence, the School District — like the State of Texas in the *Rodriguez* case (*ibid.*) — has implicitly recognized that it could never meet the rigors of this Court's strict scrutiny standard. Moreover, petitioners have consistently asserted throughout this case that no such interest could ever be advanced or fathomed by the School District. Since the Ninth Circuit decision below erroneously failed to acknowledge and apply the strict scrutiny test, it never even considered the existence of such interests.

The foregoing discussion has amply demonstrated the School District's inability to withstand the close judicial scrutiny invoked for the protection of distinct ethnic, national origin group members. Yet, the discriminatory actions of the School District cannot even satisfy the less exacting "rational basis" standard of Constitutional review.⁸⁷ The School District's purpose in providing public schools is to educate students, not to fail to do so. For the School District to operate a system of education which arbitrarily and foreseeably withholds the tools of comprehension from a large minority of students not only spites its own goals, but constitutes the zenith of irrationality. To employ means which deprive thousands of non-English-speaking Chinese students of any educational opportunities surely does not further "a legitimate state purpose or interest."⁸⁸

At no time in this case has the School District even attempted to point to any state policy or interest which its discriminatory treatment of petitioners purports to further. Indeed, Section 71 of the California Education Code provides that "[i]t is the policy of the state to insure the mastery of English by all pupils in the schools." By requiring that non-English-speaking Chinese students speak and understand English to receive any educational opportunities — while at the same time failing to provide them any instruction to learn English — the School District has turned this objective on its head and defeated, not effectuated, the state's announced goal.

⁸⁷ As this test has recently been described by this Court, the question under the rational basis standard is whether the School District's treatment of petitioners "bears some rational relationship to a legitimate state purpose." *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1302 (1973).

⁸⁸ *Id.* at 1308. In *Rodriguez*, this Court found that the Texas system of school financing bore some rational relationship to the

The School District's treatment of non-English-speaking Chinese students makes sense only if its purpose is to limit the teaching of English and other subjects to those

legitimate state interest in local control of education. Unlike the instant case, this Court in *Rodriguez* recognized that the disbursement of state and local tax revenues involves "an area in which [this Court] has traditionally deferred to state legislatures." *Id.* at 1300. The complexity of state fiscal schemes plus the "persistence of attachment to government at the lowest level where education is concerned" (*id.* at 1305) were two crucial factors in support of this Court's decision that the Texas financing system had a rational basis.

In the instant case, this Court is concerned with total educational deprivations suffered by non-English-speaking children, not with complex issues of the relative merits of complicated tax programs. Unlike the situation in *Rodriguez*, there is no lack of consensus or raging "sources of controversy concern[ing] the extent to which there is a demonstrable correlation" between non-English-speaking children receiving only English-language instruction "and the quality of education." *Id.* at 1302. Since petitioners cannot fathom or comprehend the instruction given them, the quality of "education" they receive is zero. Similarly, this Court in *Rodriguez* exercised judicial restraint in part because "the question regarding the most effective relationship between state boards of education and local school boards . . . is now undergoing searching re-examination." *Id.* at 1302. No such complex educational problems confront this Court in the instant case.

Finally, the relief requested by petitioners will in no way "result in a comparable lessening of desired local autonomy" which was of serious concern to this Court in *Rodriguez*. *Id.* at 1307. Providing non-English-speaking Chinese students with educational opportunities will not diminish the School District's legitimate "control over local policies." *Ibid.* The School District will continue to possess and exercise its substantial discretion in considering and selecting the means to provide instruction to these petitioners. The only limitation imposed on that discretion will be that which is mandated by the First and Fourteenth Amendments and the Civil Rights Act of 1964.

students who come from English-speaking homes.⁸⁹ However, this Court has always insisted not only that a state's action be rationally related to its purpose, but that the purpose itself be a permissible one.⁹⁰ To openly and callously discriminate in favor of the majoritarian English-speaking children in the schools could hardly constitute such a legitimate state purpose.

Finally, the Ninth Circuit's only suggested rationale for the School District's manifest discrimination against petitioners was that

the State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established.⁹¹

Petitioners not only agree that mastery of English constitutes a laudable instructional goal but, indeed, pursuit of that goal for non-English-speaking Chinese children is the very point of the instant litigation. Yet, the Ninth Circuit has upheld School District action which ensures the defeat of this goal — and the concomitant defeat of the State's avowed purpose to educate students — for thousands of non-English-speaking Chinese students.

Since the court below emphasized that "[t]his is an

⁸⁹Such a purpose would in essence reward children who are fortunate enough to have English-speaking parents and penalize those who do not. Unfortunately, this is the very situation which now exists in San Francisco schools.

⁹⁰E.g., *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1302 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-173 (1972). See also *United States Department of Agriculture v. Moreno*, 93 S.Ct. 2821, 2825 (1973).

⁹¹*Lau v. Nichols*, 472 F.2d 909, 916 (App. 127).

English-speaking nation,"⁹² the importance of not excluding petitioners from educational opportunities because of their lack of English language skills is further underscored. Ironically, petitioners seek precisely that knowledge and "appreciation of English" which the Ninth Circuit itself recognized as "essential to an understanding of legislative and judicial proceedings."⁹³ What the court below failed to recognize was that such "appreciation of English" is equally "essential" — indeed mandatory — if non-English-speaking Chinese students are to receive any educational opportunities. The decision below, however, sanctions the School District's denial to petitioners of these very skills.

IV

THE TOTAL EXCLUSION OF PETITIONERS FROM ANY EDUCATIONAL OPPORTUNITY VIOLATES THE CIVIL RIGHTS ACT OF 1964.

In addition to contravening the mandates of the United States Constitution, the School District's discriminatory treatment against petitioners on the basis of their ethnicity and national origin constitutes a violation of Section 601 of the Civil Rights Act of 1964.⁹⁴ In Title VI of this Act, the United States Congress expressly prohibited discrimination based "on the ground of race, color, or *national origin*" in "any program or activity receiving federal financial assist-

⁹²*Ibid.* While this description by the court below may be good normative rhetoric, it is not wholly accurate. That this is not totally "an English-speaking nation" is poignantly reflected in the complete lack of English-language skills which burdens petitioners and thousands of other non-English-speaking Chinese children in San Francisco schools.

⁹³*Ibid.*

⁹⁴42 U.S.C. §2000d.

ance."⁹⁵ To effectuate these goals, HEW was given the authority to promulgate regulations prohibiting discrimination in federally assisted school systems.⁹⁶ As a condition of receiving federal funds, recipients are required to submit assurances that they are in compliance with Title VI and the federal regulations promulgated thereunder.⁹⁷

There is no dispute that the San Francisco Unified School District annually receives millions of dollars of federal financial assistance.⁹⁸ As recipient of such funds, the School District is obligated under the terms of Section 601 of the Civil Rights Act to provide non-English-speaking Chinese students an equal educational opportunity free from any discrimination based on national origin.⁹⁹ More significantly, the School District's statutory duty includes taking affirmative steps to eliminate such discrimination. This obligation was first delineated in March of 1968, when HEW's Office for Civil

⁹⁵ *Ibid.* (emphasis added).

⁹⁶ 42 U.S.C. § 2000d-1. Regulations issued by HEW have the full effect of law. 45 C.F.R. Part 80 (1969).

⁹⁷ 45 C.F.R. Part 80.4 (1969). The San Francisco Unified School District has regularly submitted such assurances to HEW. See note 99, *infra*.

⁹⁸ See, e.g., the annual *Facts and Figures* report issued by HEW's Office of Education, Information Services and Public Relations.

⁹⁹ The School District has submitted the requisite assurances to HEW that "in consideration of and for the purpose of obtaining any and all . . . Federal financial assistance," the School District "will comply with title VI . . . and all requirements imposed by or pursuant to the Regulation [45 C.F.R. Part 80]." HEW Form 441, executed between the School District and HEW Office of Education (Jan. 20, 1965) (emphasis added). This Form 441 is attached as pp. 4a-5a of the Appendix to this instant Brief.

Rights issued a set of policies to implement Title VI.¹⁰⁰ These policies require school systems to take affirmative action to assure that non-discriminatory equal educational opportunities exist in fact for all students.

[S]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system.¹⁰¹

To further clarify the responsibilities of school districts with respect to national origin-minority group children such as petitioners, HEW issued additional guidelines on July 10, 1970.¹⁰² These rules deal explicitly with the responsibilities of federally assisted school districts to provide equal educational opportunities to those children deficient in English language skills. They were based on a finding by HEW that "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program."¹⁰³ Moreover, HEW found such linguistic deficiencies have "the effect of denying equality of educational opportunity to . . . disadvantaged pupils from

¹⁰⁰United States Department of Health, Education and Welfare, Office for Civil Rights, "Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964," 33 C.F.R. 4955 (1968).

¹⁰¹*Id.* at subpart B (§8).

¹⁰²United States Department of Health, Education and Welfare, Office for Civil Rights, "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11595 (July 18, 1970). These guidelines, which apply to the School District, are set forth at pp. 1a-3a of the Appendix attached to the instant Brief.

¹⁰³*Ibid.*

national origin-minority groups," in violation of Title VI.¹⁰⁴

Like the earlier HEW regulations, these 1970 rules require "affirmative steps [by the School District] to rectify the language deficiency in order to open [the District's] instructional program to these students."¹⁰⁵ Yet, as this Brief has amply demonstrated, the School District has taken no steps — affirmative or otherwise — to eliminate the discriminatory treatment to which non-English-speaking Chinese students are subjected. Despite this uncontested proof of the School District's violation of the Civil Rights Act of 1964, however, the Ninth Circuit's decision only mentioned this Act in a footnote.¹⁰⁶ Without the benefit of discussion, reasoning, or support, the Court below simply stated that

Our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act.¹⁰⁷

Such a disposition by the Ninth Circuit not only reflects a cavalier and summary dismissal of important federal statutory claims, but fails to accord federal administrative regulations "the great weight" to which they are "entitled."¹⁰⁸ Such great weight is especially

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* (emphasis added).

¹⁰⁶ *Lau v. Nichols*, 472 F.2d 909, 912, n.6 (App. 120-121).

¹⁰⁷ *Ibid.* In view of this cursory treatment, the Court of Appeals below never discussed or considered the numerous HEW regulations and guidelines discussed in the text accompanying notes 99-105, *supra*.

¹⁰⁸ *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

accorded to regulations issued by HEW, since it is the administrative agency charged with enforcement of the Civil Rights Act of 1964 in the area of education.¹⁰⁹ Under HEW's regulations and guidelines, then, the School District is in clear violation of the Civil Rights Act. Thus, the School District has unlawfully failed to follow the Congressional mandate to take effective "affirmative steps"¹¹⁰ to remove the barriers that block non-English-speaking Chinese students from receiving their right to educational opportunities.

CONCLUSION

In a case involving another form of educational discrimination, this Court, through Mr. Chief Justice Burger, recently stated that

There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated. . . .¹¹¹

In the instant case, the "educational message" communicated to thousands of non-English-speaking Chinese students is one of discrimination and exclusion, of official neglect and rejection, of total non-participation in the life of the classroom. For the School District to provide non-English-speaking students with instruction

¹⁰⁹ E.g., *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (1967), *cert. denied sub nom.*, *Caddo Parish School Board v. United States*, 389 U.S. 840 (1967).

¹¹⁰ 35 Fed. Reg. 11595 (July 18, 1970).

¹¹¹ *Norwood v. Harrison*, 93 S.Ct. 2804, 2812 (1973).

only in a strange tongue reduces the educational experience to mere detention of petitioners for an appointed number of hours each day, in a classroom from which no educational benefits can be derived. In view of its purpose of providing children with an education, the School District's "program" for petitioners is a "self-defeating notion"¹¹² that tragically serves to "spite its own articulated goals,"¹¹³ as well as violates Constitutional and statutory mandates. Unless this Court reverses the judgment of the Ninth Circuit Court of Appeals, such "spite" will continue, with the consequences — educational, economic, social and cultural — being directly borne by thousands of non-English-speaking Chinese youngsters.

Therefore, for the foregoing reasons, petitioners respectfully request that the judgment of the Ninth Circuit Court of Appeals below be reversed and that the School District be directed to alleviate promptly the

¹¹² *United States v. Louisiana*, 265 F.Supp. 703, 708 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1967). The complete sentence from which the quoted words come is set forth in note 14, *supra*.

¹¹³ *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

discrimination which is caused by foreclosing any educational opportunity to non-English-speaking children.

Respectfully submitted,

EDWARD H. STEINMAN

Assistant Professor
School of Law
University of Santa Clara
Santa Clara, CA 95053
(408) 984-4203

CLARENCE MOY

San Francisco Neighborhood
Legal Assistance Foundation
Chinatown-North Beach Office
250 Columbus Avenue
San Francisco, CA 94133
(415) 362-5630

KENNETH HECHT

Youth Law Center
795 Turk Street
San Francisco, CA 94102
(415) 474-5865

Dated: July 25, 1973. Attorneys for Petitioners

United States Department of Health, Education and Welfare**Office for Civil Rights****IDENTIFICATION OF DISCRIMINATION
AND DENIAL OF SERVICES ON THE
BASIS OF NATIONAL ORIGIN**

The following memorandum has been sent by the Director, Office for Civil Rights, to selected school districts with students of National Origin-Minority Groups:

Title VI of the Civil Rights Act of 1964, and the Departmental Regulation (45 CFR Part 80) promulgated thereunder, require that there be no discrimination on the basis of race, color, or national origin in the operation of any federally assisted programs.

Title VI compliance review conducted in school districts with large Spanish-surnamed student populations by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portuguese.

The purpose of this memorandum is to clarify D/HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority group children deficient in English language skills. The following are some of the major areas of concern that relate to compliance with Title VI:

- (1) Where inability to speak and understand the English language excludes national origin-minority group children

from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

(2) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(3) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.

(4) School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

School districts should examine current practices which exist in their districts in order to assess compliance with the matters set forth in this memorandum. A school district which determines that compliance problems currently exist in that district should immediately communicate in writing with the Office for Civil Rights and indicate what steps are to be taken to remedy the situation. Where compliance questions arise as to the sufficiency of programs designed to meet the language skill needs of national origin-minority group children already operating in a particular area, full

information regarding such programs should be provided. In the area of special language assistance, the scope of the program and the process for identifying need and the extent to which the need is fulfilled should be set forth.

School districts which receive this memorandum will be contacted shortly regarding the availability of technical assistance and will be provided with any additional information that may be needed to assist districts in achieving compliance with the law and equal educational opportunity for all children. Effective as of this date the aforementioned areas of concern will be regarded by regional Office for Civil Rights personnel as a part of their compliance responsibilities.

Dated: July 10, 1970

[SEAL] J. STANLEY POTTINGER,
Director,
Office for Civil Rights.

[F.R. Doc. 70-9266; Filed, July 17, 1970
8:45 a.m.]

35 Fed. Reg. 11595
(July 18, 1970)

**ASSURANCE OF COMPLIANCE WITH THE DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE REGULATION UNDER
TITLE VI OF THE CIVIL RIGHTS ACT OF 1964**

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
(Name of Applicant)

(hereinafter called the "Applicant")

HEREBY AGREES THAT it will comply with title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80) issued pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant by the Department, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during which the Federal financial assistance is extended to it by the Department.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant by the Department, including installment payments after such date on account of applications for Federal financial assistance which were approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated January 20, 1969

San Francisco Unified School District
(Applicant)

By David R. [Signature]

(President, Chairman of board, or comparable
authorized official)

155 P. M. Hogg [Signature]

San Francisco, California
(Applicant's mailing address)

5a

RECORD OF RECEIPT OF AND ACTION ON CIVIL RIGHTS ASSURANCES
Division of School Assistance
in Federally Affected Areas

SCHOOL DISTRICT (Local name, city, county, State) San Francisco Unified School District San Francisco San Francisco County California	APPLICATION NUMBER	
	- E - 128	- C - 216

- ☒ 1. Receipt of HEW 441 dated..... January 20, 1965
- ☒ 2. HEW 441 determined acceptable by SAFA Don C. Frazier
(Signature)
- ☒ 3. HEW 441 transmitted to EEOC for files...(date) February 8, 1965
- ☐ 4A. Notification received from Equal Educational Opportunities Program that Assurance or Plan (shown below) has been accepted and the Federal payment may be released.....(date) _____

B. HEW 441

☐

Court Order

☐

Desegregation
Plan

☐

C. Office of Education identification no..... _____

copy:

P.L. 815 file

P.L. 874 file

Financial folder

Statistical Record file

OE 4268 (1/65)

1973
JANUARY 1, 1973

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, et al., *Petitioners,*

vs.

ALAN H. NICHOLS, et al., *Respondents.*

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS

THOMAS M. O'CONNOR,

City Attorney of the City and County of San Francisco,

GEORGE E. KRUMER,

Deputy City Attorney of the City and County of San Francisco,

BURK E. DELVENTHAL,

Deputy City Attorney of the City and County of San Francisco,

206 City Hall,

San Francisco, California 94102,

Telephone: (415) 556-3570,

Attorneys for Respondents.



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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, et al., *Petitioners*,

VS.

ALAN H. NICHOLS, et al., *Respondents*.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS

I. INTRODUCTION

Certiorari in this case has been issued to review the decision of the Ninth Circuit upholding a ruling of the District Court finding for the respondents on the merits. Appendix 115. It was stipulated by the parties and found by the Court that more than 2,800 students in the San Francisco Unified School District received special instruction in English, in addition to formal English instruction. A substantial number of those students was not receiving the needed special instruction. Appendix 113-114. The Court additionally found that the "Defendants recognize the importance of an education and equal educational opportunities

and make education available to petitioners on the same terms and conditions as it is available to other groups within the School District." Appendix 114. The Court made an additional finding that there had been some efforts to set up remedial education programs. Appendix 114. The respondents submit that these programs are relevant to the issues in this case, insofar as they reflect on the good faith of the respondents (and the absence of discriminatory intent) and as they cast light on the complexity and magnitude of the problems confronting the school district. The scope of the problem speaks strongly for the contention of the respondents that the solution thereto lies with the elected officials and their administrators rather than with the Court.

This is not a case of racial discrimination and should not be viewed as such. Rather, it is a case of a substantial number of students with a language difficulty which is directly related to the accidents of birth—national origin, native tongue of parents, and exposure to ambient verbal communications in other tongues than English. It is a difficulty not of the school district's making. This case might be viewed as one in which the respondents are being called forward to justify their failure to provide special extraordinary assistance to the petitioners in eliminating their unique language problems. Here, too, the respondents object. The issue should not turn on whether the respondents should have satisfied the petitioners' needs. Such a question is to be resolved by legislative authority. The respondents submit that they are bound, under the Fourteenth Amendment, to

prove that their state scheme of public instruction and their administration of it are reasonably related to the legitimate state objective of educating its citizens.

Much of the argument of the petitioners and most of the amici's briefs discuss the socio-economic plight of the Chinese person and relate it to his inability to speak English. The respondents have admitted these facts and respondents are devoting a substantial portion of their financial resources and educational expertise toward finding meaningful solutions to the problems of the many students in the district who speak languages other than English.

This Court under the Constitution is not vested with the power to review, evaluate, select and enforce the proposed solutions to citizens' problems. Therefore, at the outset the respondents remind this Court that the sole issues in this case are constitutional and relate to the duties of the respondents under the Fourteenth Amendment.

II. DISTRICT COURT AND COURT OF APPEALS DECISIONS

The District Court reached the following conclusion of law:

"This Court fully recognizes that the Chinese-speaking students involved in this action have special needs, specifically the need to have special instruction in English. To provide such special instruction would be a desirable and commendable approach to take. Yet, this Court cannot say that

such an approach is legally required. On the contrary, plaintiffs herein seek relief for a special need—which they allege is necessary if their rights to an education and equal educational opportunities are to be received—that does not constitute a right which would create a duty on defendants' part to act. These Chinese-speaking students—by receiving the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students." Appendix 114-115.

The Court of Appeals ruled,

"Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group. Before the Board may be found to unconstitutionally deny special remedial attention to such deficiencies there must be found a constitutional duty to provide them.

However commendable and socially desirable it might be for the School District to provide special

remedial educational programs to disadvantaged students in those areas, or to provide better clothing or food to enable them to more easily adjust themselves to their educational environment, we find no constitutional or statutory basis upon which we can mandate that these things be done.

Because we find that the language deficiency suffered by appellants was not caused directly or indirectly by any State action, we agree with the judgment of the district court and distinguish this case from *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny of de jure cases. Under the facts of this case, appellees responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district. There is no evidence that this duty has not been discharged.

Furthermore, the determination of what special educational difficulties faced by some students within a State or School District will be afforded extraordinary curative action, and the intensity of the measures to be taken, is a complex decision, calling for significant amounts of executive and legislative expertise and nonjudicial value judgments. As with welfare, (to which these claims are closely akin), the needs of the citizens must be reconciled with the finite resources available to meet those needs. See *Dandridge v. Williams*, 397 U.S. at 472.

As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this

issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, subject only to the requirement that their classifications be rationally related to the purposes for which they are created." Appendix, pp. 126-129.

III. ISSUES

There are three issues before this Court:

- (1) Does the Equal Protection or Due Process Clause of the Fourteenth Amendment impose a duty on the respondents to undertake affirmative action so as to provide special, extraordinary assistance to the petitioners by teaching them English where there is no showing that the state either directly or indirectly caused the language disability which impairs the capacity of the petitioners fully to understand or communicate in the language of classroom instruction.¹
- (2) Does the failure of respondents to provide special assistance to the petitioners violate Section 601 of the Civil Rights Act, Title 42, Sections 2000d, 2000d-1 and the regulations adopted pursuant thereto.
- (3) May the Department of Health, Education and Welfare [hereinafter referred to as

¹As discussed subsequently, the respondents consider any claim of the petitioners to an invasion of their "First Amendment" rights to be embraced by the Due Process Clause of the Fourteenth Amendment. It should be noted that the petitioners, in their complaint, did not allege any violation of First Amendment Rights.

HEW] pursuant to the powers vested in it by Section 601 of Title VI of the Civil Rights Act (Title 42, Section 2000d-1) adopt regulations which enable it to compel the respondents to provide special English instruction to non-English speaking students.

IV. SUMMARY OF ARGUMENT

The analysis of this Court must be directed at that portion of the Fourteenth Amendment which *prohibits* a state from denying equal protection of the laws as it (the Fourteenth Amendment) is applied to the decision of the state to provide free, compulsory public education in English. Since it is clear that there has been no invidious intent, the state has not made a "suspect classification" nor does this case involve a fundamental right. Therefore, this Court must view the relevant state action (the provision of free public instruction) in terms of its reasonableness in relation to legitimate state purposes. The Court's review should be tempered by the well recognized constitutional principle that a state's attempt to provide a social benefit is not rendered invalid merely because the state could have done more or because the legislation is imperfect. Something more than "racial imbalance" or hardship on an "insular minority" is needed to justify judicial interference with a state's social policies and educational programs.

Underlying this case is the fundamental concept of the political organization of our society and the al-

location of power in it. Petitions relating to urgent social needs must be addressed to the elected representatives of the people and not to the Courts which have no legitimate business in reviewing the demands made on public resources and allocating those resources on the basis of priorities.

The decision to conduct public education in English is reasonably related to the legitimate purpose of providing general education to the population. The fact that some residents cannot understand or speak English does not render that decision capricious or arbitrary. Just as there is no fundamental right or suspect classification, there is no basis for compelling affirmative action to remedy disabilities for which the state cannot properly be held accountable. In the instant case, the petitioners' disabilities are caused by the accident of birth and are not related to any district policies. The Court has refused to abolish the distinction between *de facto* and *de jure* segregation, and likewise absent intentional discrimination, no affirmative action may be compelled in the instant case. The Fourteenth Amendment does not impose a duty on the states to equalize differences between citizens.

The Civil Rights Act has not been violated by the respondents because that act prohibits *intentional discrimination on the basis of race*. The Civil Rights Act was enacted pursuant to the delegation of power set forth in the Fourteenth Amendment and only prohibits activities which constitute constitutional violations. Thus, if the respondents' activities do not

violate the Constitution, there can be no violation of the Civil Rights Act. Likewise, the HEW regulations adopted pursuant to the delegation of authority set forth in the Civil Rights Act can only prohibit or require affirmative action relating to constitutional violations. This is the extent of the regulations application. Should they be interpreted to extend beyond regulating constitutional violations, then they have been adopted in excess of the congressional delegation of authority and are invalid.

In conclusion, the respondents have acted reasonably in setting up a scheme of public instruction and operating it in English. They have not violated the Constitution simply because there are additional, unsolved educational problems.

V. DOES THE FOURTEENTH AMENDMENT REQUIRE THE STATE TO PROVIDE SPECIAL ASSISTANCE TO CHILDREN WHO DO NOT SPEAK ENGLISH ADEQUATELY?

- A. Before A Review Of State Action Can Be Made, The State Action Must Be Identified. That State Action Is The Provision, By The State, Of Free Public Education.**

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

"... No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

A premise of equal protection review of state action is the action itself. Thus, an important issue in each case and, indeed, a necessary element of a cause of action alleging a violation of Fourteenth Amendment rights is the requirement that the plaintiff allege and prove that the state *acted* in such a way as to deprive him equal protection of the laws.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, the critical question was whether the state could be deemed to have acted to deny the plaintiffs right to equal protection of the laws where the state leased a coffee shop in a public garage to a private tenant who discriminated against the plaintiffs because of their race.

In *Shelley v. Kraemer*, 334 U.S. 1, 13, this Court referred to the Civil Rights Cases, 109 U.S. 3, wherein the Court recognized as "imbedded in our constitutional law" the principle "that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the states." Therefore, in *Burton v. Wilmington*, *supra*, at page 724, the Court recognized that the [private] restaurant operated as an integral part of a public building indicating "that degree of state participation and involvement in discriminating action which it was the design of the Fourteenth Amendment to condemn." Therefore, the Court concluded, at page 725:

"[N]o state may effectively abdicate its responsibilities by either ignoring them or merely failing to discharge them whatever the motive may be."

In *Reitman v. Mulkey*, 387 U.S. 369 (1966) this Court also found unconstitutional state action by accepting the conclusion of the California Supreme Court that Article I, §26, of the State Constitution did not merely repeal existing law forbidding racial discrimination in housing but that it was intended to establish the right to discriminate as a basic state policy and involved the state in private discriminations. Similar analysis was pursued in *Nixon v. Condon*, 286 U.S. 73 (1931); *Lombard v. Louisiana*, 373 U.S. 267 (1962), and *McCabe v. Atchison, Topeka & Santa Fe R. Co.* 235 U.S. 151 (1914.) Thus, contrary to the petitioners' contention, the Court in *Reitman*, *Burton* and *Shelley* was concerned with more than the mere "ultimate effect."

Those cases share the common characteristic of incontestable state involvement in intentional discrimination on account of race. In the instant case the disability of the petitioners is not the product of intentional discriminatory state purpose directed at them. On the contrary, in this case their problems relating to their national origin are merely an unfortunate incident of the application and administration of the state's decision to provide free public education to be conducted in English. In *Moose Lodge v. Irvis*, 407 U.S. 163 (1972), this Court emphasized the importance of the Fourteenth Amendment's requirement of state action by holding that state involvement with a discriminating private party through the granting of a liquor license and the comprehensive regulation of the license is not sufficient

to constitute state action. It was admitted in *Irvis* that the private individuals intended to discriminate and yet the Court refused to hold the state accountable for improper but not unconstitutional private intentions merely because the state granted the private parties a license to operate their bar.

Therefore, the line has been drawn and the initial element common to all cases where the state has been held accountable for private discrimination is a finding that the state's *intention* is to encourage or enforce private discrimination. There has been no allegation or showing of such an intention in the instant case.

It is therefore important to identify the state action in this case and then evaluate it based on the established constitutional principles. The basic state action which must be examined in this case is the decision of the legislature to provide public education for all its school age residents and to make English the basic language of instruction in all schools. Section 71 of the California Education Code.

The question here arises because there are some residents who, because of accident of birth, do not speak English as their native tongue, do not hear English spoken in their homes, and therefore are not able fully to understand the language spoken in the schools.

The review of the trial court was therefore framed in terms of the reasonableness of the policies designed to make free public education available to all to be

conducted in the English language. The Ninth Circuit also viewed the issue in these terms and, it is submitted, so should this Court.

1. **Since Free Public Education Is A Service Provided By The State, The Petitioners May Not Compel The State To Provide Them With Special Instruction To Remedy Their Own Personal Problems.**

It is important, then to recognize that the identifiable *state action* in this case is the *provision of free public education* to be conducted in English. It is submitted that public education has historically been one of the important functions of the state; however, it is a service which the state provides as a matter of choice and not by virtue of constitutional compulsion. Said this Court, in *Brown v. Board of Education*, *supra*, at page 493:

“Such an opportunity [to an education] *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms.” (Emphasis added.)

This concept that the state may choose whether to provide a free public education was reaffirmed in *San Antonio Independent School District v. Rodriguez*, 430 U.S. 291, 38 S.Ct. 1278, 1297, 1298, where this Court held:

“Education, of course, is *not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.* As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a state’s social and economic legislation.” (Emphasis added.)

The petitioners are not challenging the scheme of public instruction in California on the basis of its general structure or effectiveness. What they contend is that the state has not gone far enough in carrying out its decision to make available general, free public instruction. They contend that this decision means nothing to persons in the petitioners class who cannot speak English. The defendants concede that special English instruction or even a bilingual course of study is an acceptable and, indeed, valuable educational device.² Neither the relative importance of the state service nor the need for remedial measures (English as a second language, or bilingual programs) vests a constitutional right in the petitioners to demand that the School District provide a remedy for their problems.

In *Katzenbach v. Morgan*, 384 U.S. 641, the Court discussed this very point at pages 656-657:

"This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated]. . . .

"[The Federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . . . We need decide only whether the challenged limitation on the relief

²The Court should note that the respondents have in fact been pioneers in the field of bilingual instruction. See discussion *infra* pages 49-52. The respondents recognize the educational value of special assistance instruction to non-English speaking students. The issue here only relates to *constitutional duty* and not to social or educational desirability.

effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in law *denying* fundamental rights . . . is inapplicable; for the distinction challenged by the appellees is presented *only as a limitation on a reform measure* . . . Rather in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute' is not invalid under the Constitution because it might have gone farther than it did, . . . that a legislature need not strike at all evils at the same time, . . . and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . ." (Citations omitted, emphasis added.)

Likewise, free public education in California is a reform measure directed at improving the level of knowledge and the capacity of the electorate to make intelligent decisions. Such social assets are essential in a democracy. The petitioners contend that the state has not gone far enough. They do not question the general proposition that a state may establish a system of public education decreeing that the courses shall be conducted in English. What they contend is that, in addition to the general public instruction, the state, under the Fourteenth Amendment, has an affirmative duty to provide them with special assistance in English.

The state legislature in the instant case could have imposed such a duty on the defendants but did not.*

*See discussion *infra* re legislative history of Section 71 of the Education Code.

No such duty is imposed by the Constitution, and therefore the plaintiffs are possessed of no enforceable right. The Ninth Circuit affirmed this principle in its opinion when it recognized that determinations regarding how best to educate the citizens are appropriately left to legislators and are not properly a judicial function. Appendix p. 129.

Additionally, it is a well recognized principle of Equal Protection law that the Fourteenth Amendment does not require a state to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. at 486-487. In *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), the plaintiffs, unsentenced inmates of Cook County Jail, challenged Illinois absentee ballot laws on the ground that they failed to extend relief to the plaintiffs while making available absentee ballots to those physically incapacitated for medical reasons.

The Court's opinion was premised on the principle that no one has a right to an absentee ballot. Said the Court at page 807:

"It is thus not the right to vote that is at stake here but a *claimed right* to receive absentee ballots." (Emphasis added.)

Likewise, in the instant case the right to an education is not in stake here but rather a "claimed right" to receive special English instruction.⁴

⁴It should additionally be recognized that the "right to vote" asserted in *McDonald* has been recognized as a "constitutionally protected right [of every citizen] to participate in elections on an

Then the Court stated, in *McDonald, supra*, at page 809:

"Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds are silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations omitted.] . . . With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phrase of the problem *which seems most acute to the legislative mind.*' *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955), and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. . . ." (Emphasis added.)

And so in the instant case the decision to provide general, free public instruction in the language spoken by most of the citizens of the state and, indeed, the official language, most probably was intended to "address" itself to the phase of the problem (the need of citizens, the majority of whom speak English, for an

equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). As discussed earlier on, *Rodriguez, supra*, specifically held that there is no fundamental right to an education as such. Thus, if the Court in *McDonald, supra* refused to compel the state to take remedial steps in order to provide the plaintiffs in that case with special absentee ballot procedures so as to insure them the maximum benefits of their right to vote, it hardly follows that the court in the instant case erred in refusing to compel the respondents to undertake affirmative action so as to provide the petitioners with special English instruction thereby insuring for them the maximum benefits of their educational opportunity which, though important, had been held not to be a fundamental right.

education) which seemed most acute to the legislative mind.

In *McDonald*, the Court recognized that

"Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants' class."

McDonald v. Board of Election Commissioners,
supra, p. 809.

Similarly, California could, of course, make education more beneficial for all concerned by establishing mandatory bilingual education or English as a Second Language (hereafter called ESL) for all non-English speaking students. As discussed later on, California chose not to adopt such a policy. The petitioners' fundamental right to petition the government for a redress of their grievances by making their problem seem most acute to the legislative mind was exercised. The legislative history (discussed *infra*) of Section 71 of the Education Code reveals that the legislature has heard petitioners and has provided some relief by "authorizing" bilingual instruction. The legislature obviously concluded that the petitioners' problem was not so acute in relation to other demands for redress of social problems as to justify granting them a right to the special instruction they need. See also *Schlib v. Kuebel*, 404 U.S. 357, 364-368 (1971), rehearing den., 405 U.S. 948 (1972).

In essence, the Court held in *McDonald*, *supra*, that the "claimed right" to absentee ballots was unfounded; and the Court noted in its conclusion that Illinois had only become embroiled in litigation be-

cause of its "willingness to go farther than many states." Additionally, *McDonald* can be viewed as a more extreme example because the plaintiffs contended that the state, in making the *right* to the absentee ballot available to some citizens who could not come to the polls, had violated the rights of the plaintiffs who, likewise though for different reasons, could not come to the polls.

In the instant case state law has *authorized*⁵ local districts to set bilingual programs into operation; however, it has not extended the *right* to such a program to any citizens. If the constitution does not impose a duty to extend the absentee ballot to all incapacitated citizens, once some classes have obtained it, it follows in this case that the Constitution creates no duty to provide special instruction when the state has given no right to such special instruction to any residents.

An additional point should be emphasized. In *McDonald* the plaintiffs contended that the state had interfered with their right to vote. The Court recognized that the question did not relate to the interference by statutory scheme with the right to vote. Rather, the Court said the question related to the "claimed right to receive absentee ballot." *McDonald v. Board of Elections, supra*, 807. Likewise in the instant case the petitioners "charge precisely such an absolute denial of educational opportunity." However, it is submitted that the issue in this case relates to the *claimed right* to special English instruction. In

⁵See discussion *infra*, pages 39-40.

accord with the Court in *McDonald*, it is submitted that the state, in making the right to education generally available, does not vest the right to special instruction in those students because of their disabilities of which the state is not deemed a responsible cause.

C. The Compelling Interest Standard Is Not Appropriate In This Case Because There Is No Discriminatory Intent And There Has Been No Classification Scheme Based On National Origin.

The Ninth Circuit, contrary to the appellants' contention that it was not "explicitly explained" did set forth the appropriate standard of judicial review. PB 33. The Court ruled,

"As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, *subject only to the requirement that their classifications be rationally related to the purposes for which they are created.*" (Emphasis added.)

Appendix, page 129.

The petitioners concede in their brief that the District has not erected physical barriers at the school house door, and argue that in *failing* to make a classification which, in essence, sets them apart and accords to them special treatment on the basis of their language

difficulties, the respondents have created a suspect classification. PB 14.

It is submitted that discriminatory purpose to classify on the basis of national origin is a necessary prerequisite to the imposition of the compelling interest standard. This was the ruling in *Keyes, infra*, and *Rodriguez, supra*. The Court spoke, in *Rodriguez*, at page 1294, of "purposeful unequal treatment," and *Brown, supra*, also invalidated a state classification scheme based solely on race. See also *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma*, 339 U.S. 637 (1950), in which Negroes were excluded from a white law school, or segregated from whites in graduate school. No such scheme can be identified in the instant case. Whereas the color of a man's skin bore no relationship to legitimate educational objectives, the decision to provide public education in English is directly and reasonably related to the objective of providing general public education.

If the defendants had passed a law prohibiting children of Chinese ancestry or Chinese speaking children who cannot speak English from attending school, then there would be a suspect classification.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1885), the Court stated, at page 373:

"... For the cases present the ordinance in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with

their administration . . . *with a mind so unequal and oppressive as to amount to a practical denial . . . of . . . equal protection of the laws. . . . Though the law itself be fair on its face . . . if it is applied and administered by public authority with an evil eye and an unequal hand. . . .* (Emphasis added.)

In the present case, there was no evidence in the record before the Court to support the conclusion that the State Education Code, and in particular Section 71 thereof, were enforced with an unequal or an oppressive mind, an evil eye, or an unequal hand.

In *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 515, the Court stated:

“ . . . nor is there any doubt that the act . . . was chiefly directed at the Chinese merchants. . . . ”

And the Court concluded, at page 528:

“ . . . As against the Chinese merchants of the Philippines, we think the present law which deprives them of something indispensable to the carrying on of their business, *and is obviously intended directly to affect them as distinguished from the rest of the community, . . .* ” (Emphasis added.)

There was no evidence presented to the District Court to support the conclusion that the scheme of public instruction requiring the teaching of English in public schools was “chiefly directed” at Chinese speaking students (or students of any other non-English speaking ethnic origin), nor was it intended to “affect them as distinguished from” other students.

The respondents do not dispute that the persons of Chinese origin are an identifiable ethnic minority; however, what they do dispute is the suggestion that the state *acted* in any way to deprive them of opportunities on the basis of their nationality. As explained above, the very essence of the petitioners' contention is that the state did not set them aside on the basis of their linguistic disabilities which the petitioners contend is tantamount to identifying their ethnic identity.⁶

The strongest repudiation of any alleged evil purpose can be found in another decision of Judge Burke rendered in the case of *Berkelman v. San Francisco Unified School District*, C-71 1875 LHB.⁷ The case is presently on appeal to the Ninth Circuit Number 73-1686; however, Judge Burke's Findings of Fact have not been challenged in that case. Judge Burke, in reviewing the evidence, made the following finding of fact (Respondents' Appendix A, p. 8):

"The percentages of various groups at Lowell as compared with the percentages of such groups in the district at large are these: twenty-nine and eight-tenths percent of Lowell's students are

⁶It is also not necessarily true that ethnic origin and language disabilities are coterminous. There are many Chinese students in the District who speak English well and succeed. Likewise, a non-Oriental could conceivably be born in the Oriental milieu and be unable to speak any language except Chinese. Thus, not only is there no discriminatory purpose directed against Chinese speaking students, but, also, it is not clear that there is an identity between racial origin and native tongue.

⁷Respondents' Appendix A contains a copy of Judge Burke's Memorandum of Opinion and Order of Summary Judgment.

Chinese; the District all-high school percentage is 17.9%.”⁸

It is therefore patent that a substantial number of Chinese students excel in the San Francisco Unified School District.

The petitioners' complaint is replete with allegations relating to “newly arrived immigrants.”⁹ Their complaint, combined with the total absence in it of any allegations of invidious or discriminatory purpose substantiates the respondents' contention and, indeed, the inevitable conclusion of both Courts below, that the language disability of the petitioners is directly related to their status as immigrants or American-born issue of immigrants who have grown up in the cultural and linguistic environment of the Orient. Their disability has not been caused, created or exploited by any intentional policies of the respondents.¹⁰

Therefore, it is submitted that the petitioners have failed to establish that the state has drawn a classification based on the suspect criterion of alienage or national origin and, therefore, the District Court

⁸Lowell High School is the public high school system's academic and most prestigious high school, drawing its student body from all over the City and choosing its applicants from among the students with the highest grades in junior high in the necessary prerequisite courses. Lowell has approximately 3,000 students. (See Respondents' Appendix A, pp. 5-6.)

⁹Part V, Section 12, of their Complaint—Appendix page 12. See also Part V, Section 15, Appendix 13, and Part II, Section 17, Appendix 13.

¹⁰It may be argued that the Respondents' failure to act “perpetuated” or “exacerbated” the petitioners' disability. However, the constitutionally recognizable consequences of a failure to act must be premised on a duty to act. That duty is the central issue in this case.

properly imposed the standard of reasonableness in reviewing the scheme of public instruction placed in issue in the instant case.

In the very recent case of *Jefferson v. Hackney*, _____ U.S. _____, 92 S.Ct. 1724 (1972) the Court was called upon to review a welfare scheme in Texas which gave AFDC recipients a lower percentage of their standard need than other recipients. The plaintiffs claimed that the proportion of AFDC recipients who were black or Mexican American was higher than the proportion of other classes of recipients who fall into those minority groups. After referring to its deference to legislative and administrative discretion the Court said, at page 1732,

"The standard of judicial review is not altered because of appellants' unproven allegations of racial discrimination."

The Court then reviewed the relevant statistics and cautioned:

"... The acceptance of the appellants' constitutional theory [racial imbalance is 'constitutionally suspect'] would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment." (Footnotes deleted.)

The same analysis can be applied in the instant case. The mere fact that certain identifiable groups

are disadvantaged does not render a scheme of public instruction admittedly directed at the advancement of substantial state interests "suspect" and therefore subject to rigid judicial scrutiny. See *James v. Valtierra*, 402 U.S. 137 (1971), in which the Court reviewed an equal protection challenge to a California referendum requirement because it imposed a mandatory referendum to obtain approval for low cost housing while referenda relating to other legislation were not imposed. Said the Court at page 142:

"But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." 402 U.S., at 142, 91 S.Ct. at 1334.

Thus, the Court is simply not about to impose the compelling interest standard on a showing of "disadvantages [to] a particular group." Something more is required—that additional element is the invidious purpose, the discriminatory intent, which is not tolerated. No such intent was alleged or proved in the instant case, and therefore it is submitted that the proper judicial standard for the review of the educational policies and procedures is the "reasonable-

ness test." The District Court properly applied that standard in the instant case.

D. The Legislative Decision To Conduct Public Schools In English Is Reasonably Related To The Objective Of Providing Free Public Education.

The petitioners are left with the requirement that they must establish that the system of public education is arbitrary and unreasonable, overcoming the presumption of validity which normally obtains when a Court reviews a scheme of state legislation.¹¹ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). Therefore, it is submitted that the scheme of public instruction set forth in the Education Code and the requirement of Section 71 thereof that English be the language of instruction and that mastery of English be a mandatory requirement of public education should be viewed in terms of its reasonableness. In *Meyer v. Nebraska*, 252 U.S. 396, 398 (1922), this Court stated:

¹¹The petitioners refer to the Court's refusal in *Rodriguez*, *supra*, to involve itself in the complex issues of the relative merits of complicated tax programs and suggest that, "No such complex educational problems confront this court in the instant case." PB, pp. 41-42, footnote 88. The respondents refer to the exhibits (Appendix, pages 60-111.) These documents substantiate the proposition that the administration of bilingual and ESL programs is a new, highly complex and very costly field of public educational endeavor demanding a substantial commitment of public resources and requiring a high level of expertise in the preparation of course materials, the education of teachers and the actual administration of the program. The implication is that when the compelling interest standard is imposed, the Court must involve itself in evaluating the legislation in terms of whether it is the best means [least restrictive of fundamental rights] to serve the compelling state interest. In other words, the compelling interest standard does not tolerate imperfection. That could be a difficult task in the instant case.

"The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes within the police power of the state."

Though *Meyer* dealt with a different issue, the court's dictum recognizes that it is reasonable to establish a system of public education and conduct it in English, the official language and dominant dialect of our social order. The Ninth Circuit resolved this question directly and succinctly:

"In our case . . . the state's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. §1423(1); likewise, California requires knowledge of the language for jury service, Cal. Code Civ. P. §198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the state. Cal. Const. Art. IV §24; Cal. Code Civ. P. §185, and of the nation. Use of English in the schools has this firm foundation. . . ."

The petitioners contend that it is unreasonable to provide public education in English to them since they cannot speak English. Since English is the majority language in this country, the decision to provide public education in a language which is likely to reach the largest number of people is hardly

rendered unreasonable by the fact that some citizens cannot benefit by it.

It is suggested, also, that it is arbitrary to establish a system of compulsory education in English and then require the attendance of students who cannot speak English. There are several answers to this argument: (1) The socializing experience of school which transcends the limitations of the medium of verbal communication justifies compulsory public education; (2) one of the best ways to liberate non-English speaking children from their cultural isolation is to place them with children who speak only English. This is admittedly not so desirable a means as ESL or bilingual instruction; however, it is an undisputed anthropological fact that a language is initially learned by imitation of speech patterns heard from others. The contact with fellow English speaking students is likely to stimulate the native proclivity for verbal imitation; (3) It is, furthermore, a well recognized principle of Constitutional law that state action which enforces a classification scheme is not judged unconstitutional merely because it fails to achieve a certain degree of mathematical nicety. *Norvel v. Illinois*, 373 U.S. 420, 423-424 (1963). *Morey v. Doud*, 354 U.S. 457, 463 (1952.)

Thus, the Court must determine whether the decision to provide public education and to conduct the schools in English was "without any reasonable basis and therefore purely arbitrary," while recognizing that "it is not enough that the measure in question results in some inequality or that it is not drawn 'with

mathematical nicety.' " *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 65 (1910). It must be concluded that the distinctions drawn in the instant case "have some basis in practical experience." *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). And it may not be contended that the system operates "on the basis of criteria wholly unrelated to the objective of the statute." *Reed v. Reed*, 404 U.S. 71, 76 (1971). Nor may it be contended that the objective of maintaining schools in the English language is beyond the state's power to achieve. *NAACP v. Alabama*, 377 U.S. 288 (1964). Finally, it is only "arbitrary" or "invidious" discrimination which the courts will consider on constitutional grounds, after an examination of the circumstances of each case, with particular attention paid to the legal context, the nature of the individual interests allowed, and the nature of the state interest served. *Kraemer v. Union Free School Dist.*, 395 U.S. 621, 626 (1967). *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). This test is not confined to cases reviewing commercial and safety regulations. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The reasonable relationship test applied to administration of public welfare assistance, even though this "involves the most basic economic needs of impoverished human beings." *Rinaldi v. Yeager*, 384 U.S. 305, See also *San Antonio Independent School District v. Rodriguez*, *supra*.

Lying behind these cases is the court's conception of the Fourteenth Amendment, its purport and intent, its scope and potency. Many cases reaffirm the principle that the Fourteenth Amendment was not enacted

with the intention of destroying the federal system. Nor do the courts view the Fourteenth Amendment as a tool which enables the courts under the auspices of the federal constitution to control the administration of government by the states. In *Younger v. Harris*, 401 U.S. 37, 44, 27 L.Ed.2d 669, 675 (1971) Mr. Justice Black said at pages 675-676:

"The entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

See also *Oregon v. Mitchell*, 400 U.S. 112, 124-128, 27 L.Ed.2d 272, 287 (1971). At page 128, Mr. Justice Black stated:

"... The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit

Congress to prohibit every discrimination between groups of people. . . ."

It is submitted, then, that when the court views the instant case in terms of the above-delineated standard of review it can only conclude that the scheme of public instruction conducted in English is a reasonable means of reaching a legitimate state objective.¹²

E. There Is No Basis For This Court's Imposing A Duty On The Respondents To Undertake Affirmative Action In The Instant Case.

The question of importance is when a state shall be deemed to have violated the "no state shall" proscription of the Fourteenth Amendment, thereby justifying judicial intervention leading to the imposition of a duty on the state to take affirmative steps to remedy an inequity.¹³

¹²See California State Constitution Article IV, Section 1, which provides in part that "a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people. . . ."

¹³It can be argued that the imposition of duty to undertake affirmative action is premised on the establishment of a "suspect classification" or "fundamental right." In these instances, the Court does not defer to legislative discretion but, rather, it examines the classification, substituting its own judgment for that of the legislators or administrators and finally, in appropriate cases compelling affirmative action to secure the fundamental rights. There is, therefore, a definite and complementary relationship between a decision to impose a duty to undertake affirmative action and a determination that a "suspect classification" has been made, thereby invoking the compelling interest standard. Thus the discussion in the section relating to the inappropriateness of this case for the imposition of the compelling interest standard is also apposite to the present discussion relating to a duty to undertake affirmative action.

It is important to emphasize that the disability of the plaintiffs cannot be attributed to any exclusionary state policies of cultural isolation or discrimination. The plaintiffs cannot speak and understand English because their cultural extraction is Chinese. See Appendix, pages 100-101, where it was estimated that of the 23,231 persons who would immigrate to the United States from China in 1968-1969, 4,788 would settle in San Francisco. Additionally, it was noted that between 1956 and 1960, more than one-third of the 22,421 Chinese immigrants to the United States settled in Chinatown and the North Beach area.¹⁴ It is clear that the critical element in the problem is the immigration of many Chinese into the United States.

Therefore, the "disability" not having been state imposed or state perpetuated, the question really is whether the state may be bound, under the Fourteenth Amendment, to take affirmative action to remedy defects or compensate for disabilities which the state cannot be deemed to have caused.

The plaintiffs refer to *Bullock v. Carter*, 405 U.S. 134 (1972); *Mayer v. Chicago*, 404 U.S. 189 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Douglas v. California*, 372 U.S. 353; and *Griffin v. Illinois*, 351 U.S. 12, to support their contention that the state may be bound to take affirmative, curative action to remedy disabilities not imposed by the state.

¹⁴San Francisco contains the largest Chinese population in the world outside the Orient. See AC Brief of the Chinese Consolidated Benevolent Association, et al., p. 7.

These cases are inapposite. In *Bullock v. Carter, supra*, there was clearly state action in the imposition of a filing fee requirement which substantially impaired the "fundamental" rights of less affluent electors to vote for the candidate of their choice. This case followed the line of authority which started with *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), holding that a citizen's affluence bore no reasonable relationship to his capacity to exercise his fundamental right to vote. In the instant case the District's policies do not weigh heavily on the exercise of any fundamental rights. Whereas affluence was deemed irrelevant to intelligent exercise of the franchise in *Harper*, the administration of the institutions of public education in the dominant dialect and official language is reasonably related to the advancement of many compelling state interests.

In *Williams v. Oklahoma City, supra*; *Mayer v. Chicago, supra*; *Douglas v. California, supra*; and *Griffin v. Illinois, supra*, the state action was clearly different from the instant case. In this case the Court is called upon to invalidate the constitutionality of a scheme of universal public instruction because it fails to accommodate the special needs of a certain segment of the students. In *Douglas, Griffin*, and their progeny, the Court was motivated by the necessity of securing for criminal defendants their due process rights to a just trial and fair procedures, regardless of their affluence. See also *Gideon v. Wainwright*, 372 U.S. 335 (1962). Additionally, once again the Court in those cases concluded that a man's wealth bore no reasonable relationship to his guilt or innocence.

It should be noted, further, that in the case of the person charged with a crime, *the state has set him apart* from all other citizens and is proceeding to obtain extraordinary sanctions against him, in the form of either a fine or a deprivation of his liberty. This extraordinary state action is hardly analogous to the instant case where the state institutes compulsory education for all its students. Thus, in the instant case the plaintiffs are not challenging state action which picks them out and imposes some onerous burden but, rather, they are challenging the state for its failure to set them apart and give them special treatment because of their unique problems.

The appellants suggest that there has been discrimination against members of the plaintiffs' minority group. The respondents submit that such a contention is irrelevant to any issue on this appeal, first, because there was no evidence submitted to the Court of any invidious, discriminatory purpose, and second, because the record is well documented that the language difficulties of the plaintiffs can be attributed directly to their status as immigrants or issue of immigrants from China entering the respondent's School District, bringing with them the language and customs of the Oriental, Chinese culture. Therefore the petitioners' problems are not attributable to actions of the District but, rather, arise from cultural factors over which the District has no control.¹⁵

¹⁵One of the persevering Constitutional questions of our time is whether, and to what extent, the state may be bound to equalize native or accidental differences or advantages between citizens. That is the issue in this case.

The inquiry of this Court inevitably turns to *Brown v. Board of Education*, (*supra*). In that case, the Court invalidated a classification scheme based *solely* on race and intended to segregate white from black students. The petitioners contend that the decision of the Court below erroneously interpreted *Brown*. The Court below reasoned that *Brown* involved "legally constituted and enforced dual school systems." Appendix page 120. Furthermore, said the Court, "*Brown* concerned affirmative state action discriminatory against persons because of their race." Appendix page 120. The Court, in essence, rested its conclusion on the critical language of the Fourteenth Amendment that "[N]o state shall . . . deny . . . to any person . . . the equal protection of the laws." Appendix 120. (Emphasis the Court's.) Thus, the Court of Appeal preserved the distinction between de facto and de jure segregation, and concluded that before a state may be bound to take affirmative action under the Fourteenth Amendment to relieve some disability, the state must have been implicated in the creation or perpetuation of the disability.

In the very recent case of *Keyes v. School District No. 1*, 93 S.Ct. 2686 (1973), 41 U.S.L.W. 5002, June 21, 1973, the Court reaffirmed this distinction by refusing to accept the contention that mere racial imbalance in the composition of various schools in a district is enough to establish a constitutional violation.¹⁶

¹⁶It is to be noted that Mr. Justice Brennan stated, at page 2692, "Petitioners apparently concede for the purposes of this case that in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that

Rather, the petitioners must show some discriminatory purpose or invidious intent before the state can be held accountable for the racial imbalance. *Keyes, supra*, at 2693. See also *Sweatt v. Painter, supra*, *Korematsu v. United States*, 324 U.S. 885 (1944); *Donovan v. Board of Education*, 336 F.2d 988, 998, cert. den. 380 U.S. 914 (1964). The critical element, then, is the existence of some state imposed segregation or discrimination on account of race. In the instant case the petitioners are complaining because there has been no segregation and, in fact, that is just what they seek. They want the District to set them aside on the basis of their language disability and provide for them special educational services. If the petitioners were to prevail in this case, then every identifiable group in our society with apparent, recognized disabilities could call for special remedial state action on the theory that the state's failure to act when confronted with a serious problem constitutes a violation of the constitutional rights of the aggrieved citizen.

In *Rodriguez, supra*, this Court specifically held that there is no right to an education set forth either explicitly or implicitly in the Constitution. Therefore, there is no basis in the United States Constitu-

segregated schooling exists but also that it was brought about or maintained by intentional state action." However, Mr. Justice Powell's dissent, urging an abolition of the de jure-de facto distinction, clearly establishes that this distinction weighed heavily in the Court's ruling. Needless to say, had the Court considered mere racial imbalance to constitute a Fourteenth Amendment violation, then the discussion in the majority opinion of the perils in attempting to isolate the discriminatory intent to a certain segment of the system would have been unnecessary.

tion for a court to impose any affirmative duty on the respondents to provide the petitioners with special instruction to remedy their educational handicaps.

This is the gist of *Brown, supra*, and *Keyes, supra*. Where the state has not acted to discriminate against a class of citizens because of their race, the state does not have an affirmative duty to eliminate a condition of racial imbalance.

The disability of the petitioners in this case does not find its roots in any heritage of deprivation. Petitioners or their ancestors voluntarily immigrated to this country, and their linguistic difficulties arise from the cultural differences between their present and past environments; and, in fact, as demonstrated earlier, the elite high school of the public school system is nearly 30% Chinese. Thus the avenues of opportunity are open to Chinese residents along with all others in their pursuit of excellence.

The petitioners' case confuses two fundamental terms: "need" and "right." What they have incontrovertibly demonstrated is a *need* for special assistance; however, a right does not find its Constitutional genesis in a *need*. The correlative *duty* for which enforcement is sought must arise from some *right*. This distinction is important in the operation of our political system. A *need* does provide a basis for a petition to the legislative and/or administrative branches of government. A legislative or executive decision might result in the creation of a right. Once the petitioners have that right, they may petition the

Court for the enforcement of the duty correlative to that right. It is the legislature's function to entertain petitions premised on social needs, to set priorities, and finally, to exercise its discretion in determining which needs most merit relief in the form of laws creating the rights necessary to satisfy those needs.

Section 71 of the Education Code, as originally enacted in 1959, reads, "All schools shall be taught in the English language." In 1967 and 1968 that section was amended, and in its present form reads,

English shall be the basic language of instruction in all schools.

The governing board of any school district and any private school may determine when and under what circumstances instruction may be given bilingually.

It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that *bilingual instruction may be offered* in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is *authorized* to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

Pupils who are proficient in English and who, by successful completion of advanced courses in a foreign language or by other means, have become fluent in that language may be instructed in classes conducted in that foreign language. (Emphasis added.)

A 1968 amendment added the final paragraph and does not concern us here; however, the 1967 amend-

ment, as originally submitted, contained the same language as the present section (exclusive of the final paragraph), except that the word "encouraged" in the last sentence of the third paragraph was changed to the present word "authorized." See *Journal of the Senate of California*, 1967, vol. 1, p. 539.

It is therefore evident that the legislature responded to petitions based on the needs of some citizens by *authorizing* local school boards to institute bilingual instruction programs. However, the legislature did not compel local districts to undertake such programs, nor did the statute, as finally passed, even encourage the adoption of bilingual instruction. The legislature merely *authorized* such procedures. This analysis is important in that it focuses this Court's attention on the underlying issues in this case. With the exception of fundamental rights specifically, or by implication, set forth in the Constitution, the great source of enforceable rights and correlative duties, under the doctrine of separation of powers, is the legislative enactments of elected bodies. It is the legislature's province to determine how best to fulfill the relevant social and economic objectives within the limits of the resources available.

When the legislature seeks to solve social problems, it acts as an agent of the people vested by the electoral process with the authority to set priorities, allocate public resources and levy a tax on the citizenry to defray the cost of public services. If the problems are incompetently solved or if the priorities set do not reflect the desires of the people, then the electoral

process (including recall) provides the people with an opportunity to air their grievances and to choose leaders who will make a more socially desirable allocation of the finite public resources to resolve the infinite numbers of social problems. See *Dandridge v. Williams*, 397 U.S. 471, 485-486.

Once the elected representatives or the administrators to whom they delegate responsibilities set the priorities and enact into law or regulations the desires of the public, thereby creating rights and duties, then the judicial system can be petitioned to arbitrate between various members of the community determining the extent of rights and duties and providing appropriate enforcement.

However, it is not the function of the judiciary to set priorities and, in effect, create rights. The judiciary is primarily a remedial body which provides the relief necessary to enforce the rights. It is a dangerous and, indeed, totalitarian, concept that the judiciary should assume the role of setting priorities, allocating resources, and creating legally recognizable rights and duties. Such a procedure, in essence, signifies that the judiciary has concluded that the common man cannot govern himself and is incapable of selecting leadership which can make the best use of public resources, the implication being that the judiciary knows best how to govern.¹⁷

¹⁷In *Rodriguez, supra*, at page 1295, Mr. Justice Powell adopted the response of Mr. Justice Stewart in *Shapiro v. Thompson*, 394 U.S. 618 (1969), to the contention that the Court had become a super legislature, "... But Mr. Justice Stewart's response in *Shapiro* to Mr. Justice Harlan's concern correctly articulates the

For these reasons, the defendants submit that it is not only an unprecedented but also a dangerous constitutional doctrine to contend that where there is an important social need, the courts, under the fiat of the Fourteenth Amendment, can create a duty to fill that need and enforce the duty. The logical legerdemain of the appellants' cause of action when revealed justifies the conclusion of the Ninth Circuit,

" . . . As long as there is no discrimination by race or national origin, . . . the states should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands. . . ."

Appendix page 129.

F. The Fourteenth Amendment Does Not Require The State To Equalize Differences Between Citizens.

The converse of the question regarding whether the state must take affirmative action where it has not imposed or contributed to the disability for which relief is sought is the question of whether the Fourteenth Amendment requires the state to equalize differences between citizens. Said Mr. Justice Powell in *Rodriguez* at 93 S.Ct. 1291:

" . . . at least where wealth is involved the Equal Protection Clause does not require absolute equal-

limits of the fundamental rights rationale employed in the court's equal protection decisions: "The court today does not "pick out particular human activities, characterize them as fundamental and give them added protection. . . ." To the contrary, the court simply recognizes as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.'" 394 U.S. 642, 89 S.Ct. at 1335 (Emphasis from original.)

ity or precisely equal advantages. Nor indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense."

Mr. Justice Powell further emphasized in *Rodriguez* that *Douglas, supra, Griffin, supra, and Mayer, supra,* do not stand for the proposition that the Fourteenth Amendment requires absolute equality.

The petitioners read *Rodriguez* as compelling the state to provide an opportunity to acquire the basic minimal educational skills. The gist of the *Rodriguez* opinion was the *opportunity*. The fact that the plaintiffs may not be able because of disabilities unrelated to any state action, to take advantage of those opportunities on an equal basis with English speaking children does not alter the fact that the opportunity is provided. Say the petitioners:

"The exclusion of non-English-speaking Chinese youngsters from any educational opportunities is admittedly not caused by the School District erecting physical barriers at the school house door. These children are permitted, indeed required, to sit—and languish—in regular classrooms for six hours a day."

Petitioners' Brief, page 14.

This is the gist of the case and the basis for Judge Burke's ruling:

"These [plaintiffs]—by receiving the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—

are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students."

Appendix pages 114, 115.

Whatever may be said about *Rodriguez* and its conclusion regarding the absence of a right to an education, it is clear that when the Court was talking about an opportunity to an education in *Rodriguez*, it was not referring to an opportunity which is tailored to fit the individual needs and personal problems of each student. *Rodriguez* was talking about an educational opportunity in the general sense. The guaranty of equal protection is not a guaranty of equality of operation or application of state legislation on all citizens of a state. *Stebbins v. Riley*, 268 U.S. 137. Thus, the language in *Rodriguez* relating to educational opportunity is exactly apposite. Provided the state undertakes a reasonably conceived project to provide public educational opportunities to its citizens, the courts are not empowered under the Fourteenth Amendment to invalidate the educational system because some of the school age residents, due to physical, emotional, or cultural disabilities are unable to take advantage of these opportunities.¹⁸ Should the petitioners prevail in this case, then under the Fourteenth Amendment the paraplegic may

¹⁸It is to be noted that substantial legislative relief has been provided for physically handicapped children, Calif. Education Code §6801 et seq., for the mentally retarded children, §6201 et seq., for deaf children, §12801 et seq. and for "educationally handicapped" children. See also the following provisions of the Education Code §5770 et seq., disadvantaged children, §6450 et seq., non-English speaking children, §6870, exceptional children.

compel the state to transport him to the school; the deaf person may *compel* the state to give him a hearing aid; the children of the Samoan, Czechoslovakian, German, Armenian, Portuguese, Vietnamese, Italian, Indian, African, and Arabian, immigrants may *compel* the state to provide them with special assistance to learn English.

The implications of the petitioners' contention are even more pervasive. A municipality like San Francisco decides to provide public transportation (a privilege [but not a right of the population] of such great importance that general paralysis would result if the Municipal Railway were taken out of service). The paraplegic contends that physical mobility is absolutely essential to his well being and that without it he cannot earn a living, obtain an education, support a family, etc. He contends that the city has acted arbitrarily in setting him and all paraplegics in a suspect classification by providing public transportation which is absolutely useless to him. Needless to say, the implications of such a theoretical approach are without limitation. The petitioners' hypothetical example relating to the hospital giving the patient the wrong medicine is inapposite. More appropriate would be a public health facility which does not provide therapy or rehabilitation for mentally and emotionally disturbed. The decision to provide some health services is not rendered invalid simply because there are some citizens who still have not obtained the medical help they need.

Recently the California Supreme Court was called upon to determine whether the state must provide non-English speaking recipients of welfare (those

literate in Spanish) with notice of termination or reduction of welfare payments in Spanish. The Court concluded that the sole issue was whether the Constitution requires that the notices be in Spanish. *Guerrero v. Carleson*, _____ C.3d _____ L.A. 30079, July 30, 1973. (Opinion Attached, Appendix B.) The Court stated, at pages 6-7, its opinion

"The United States is an English speaking country. Despite California's early Spanish culture, the language of our state government has long been that of the waves of American settlers who migrated here when California joined the Union . . . Justice Holmes declared a half-century ago 'It is desirable that all citizens of the United States should speak a common tongue.' *Meyer v. Nebraska* (1923) 262 U.S. 390, 412 (dissenting opinion). And this Court recently recognized that 'The state interest in maintaining a single language system is substantial . . .' *Castro v. State of California* (1970) 2 Cal.3d 223, 242."

The Court rejected the argument that equal protection of the laws was denied to the non-English speaking welfare recipients, when notices were sent to them in English only.

In *Carmona v. Sheffield* (N.D. Cal 1971), 325 F. Supp. 1341, aff'd per curiam, _____ F. 2d _____. The Court dismissed an action by Spanish speaking citizens who sought to compel the state to administer its unemployment insurance program in Spanish. Said the Court, at page 1342:

"In essence, plaintiffs' contention would require the State of California and, presumably, all other States and the Federal Government to

provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood. The breadth and scope of such contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the courts and administrative agencies, would become all but impossible . . .

* * *

"The extent to which special consideration should be given to persons who have difficulty with the English language is a matter of public policy for consideration by the appropriate legislative bodies and not by the courts. . . ."

(Emphasis added.)

Intractable economic, social, and even philosophic problems presented by public welfare assistance programs were recognized not to be the business of the Supreme Court. *Dandridge v. Williams, supra*. This Court said, in *Dandridge*, at page 485:

"In the area of economics and social welfare, a state does not violate the Equal Protection clause merely because the classifications made by its laws are imperfect. If this classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31

S.Ct. 337, 340. The problems of government are practical ones and may justify if they do not require, rough accommodations, illogical, it may be true, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443."

In *Jefferson v. Hackney*, *supra*, this Court ruled that, "So long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight jacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

In the instant case, education is an important aspect of the state's scheme of laws to provide for the general welfare of the people. Education poses practical problems of immense magnitude. It could be said that the decision to provide free public education, conducted in English, is a "rough accommodation" of the demands of the society for education to the reality that English is the official language. Finally, the Fourteenth Amendment does not vest in the federal courts the power to impose on the San Francisco Unified School District a particular court's notion as to whether it is a wise, social policy and expenditure of public resources (in light of all the demands made on the District) to provide special language instruction to non-English speaking students. *Dandridge v. Williams*, *supra*, at pp. 485-486. The Constitution simply "does not provide judicial remedies for every social and economic ill." *Lindsey v. Normet*, 92 S.Ct. 862,

874. The function of the Fourteenth Amendment is negative and not affirmative and it carries no mandate for particular measures of reform. *Ownbey v. Morgan*, 256 U.S. 94. Absent a constitutional mandate the assurance of adequate educational facilities and the determination of what should be provided are not judicial functions. These are matters for the Board of Education and the state legislature to resolve. The respondents do not denigrate the importance of education, nor do they deny the existence of the petitioners' need; however, the respondents submit that the petitioners have directed their plea at the wrong public agency. This whole question involves the exercise of legislative and administrative discretion and does not fall within the pale of judicial fiat under the Fourteenth Amendment. Therefore a state may undertake to provide some social services without satisfying all needs or curing all demands. The Equal Protection Clause does not require absolute equality. *Breedlove v. Suttles*, 302 U.S. 277.

G. The Respondents Have Undertaken Substantial And Productive Steps To Establish Programs To Deal With Problems Similar To Those Of The Petitioners.

In the area of special bilingual instruction the respondents have been in the forefront of the educational field in seeking and obtaining funding for bilingual and ESL programs ("Teaching English as a Second Language"). At the time this action was instituted, San Francisco's School District had one of the only two federal grants to cities (New York being the other) for a pilot program in Chinese bilingual

studies. The original grant of \$50,000 was increased to \$198,000 for the 1970-71 fiscal year, enabling the District to expand and strengthen the program. Appendix pp. 60-93 contain documents submitted to the trial court. In the preliminary report on the Chinese bilingual program, the preface states, in pertinent part:

"Since the inception of the program, requests have been made from educators and interested citizens around the globe for information regarding the new program." Appendix p. 80.

Therefore, affirmative state action to combat language deficiencies due to the divergent cultural extractions of some students was not a well-recognized everyday procedure. San Francisco was one of the first public school districts to undertake a solution to these very difficult and as yet unsolved educational problems. And this undertaking stimulated worldwide interest and attention. The District carried the responsibility of preparing course materials for bilingual instruction (Appendix pages 85-86), training teachers in techniques of language instruction (Appendix page 86), and providing demonstrations of ESL techniques. See also Appendix pages 89-91 regarding summer in-service workshop.

In addition to the above mentioned grants, the School District had invested \$100,000.00 of its own funds in a Chinese Education Center. See affidavit of Isadore Pivnick, Appendix pages 36-37. See also the affidavit of Wellington Chew, Appendix pages 38-39, and affidavit of Edward Goldman, Appendix pages 53-54.

These statistics render specious the petitioners' contention that

"Though the School District receives extensive federal financial assistance, it has taken no affirmative steps to rectify the discrimination suffered by non-English-speaking Chinese students." PB 10-11.

There is obviously the additional question which this Court would have to answer were the petitioners' theory adopted: How much help is enough help? This question is more than rhetorical. Does the Constitution merely compel ESL or must the District get up bilingual instruction? Must ESL instructors be able to speak Chinese? Under the compelling interest standard this Court would have to resolve these questions since that standard only tolerates state classification schemes which are narrowly drawn so as not to infringe on fundamental rights or tread into the no-man's land of the suspect classification. This is just what the petitioners sought in their complaint where they complained that, as to the second class of plaintiff who did receive some help, it (the help) was either not full time or administered by non-Chinese speaking ESL instructors or placement in the special classes was not based on tests or ascertainable standards. It is submitted that this Court is not the proper forum to review and resolve these questions.

Chinese students are not the only non-English speaking ethnic groups with substantial representation in the San Francisco Unified School District. The Report of Robert E. Jenkins contains a table (Appendix p. 63) which identified students who

needed special instruction in English in 1967. The survey counted more than 1800 Spanish-speaking children (there were more than 2400 Chinese-speaking students) and more than 700 children of "other languages." Thus, if the district may be compelled, by the Constitution, to provide the petitioners with special instruction, then similar assistance could be demanded on behalf of Spanish, Filipino, Japanese and other students who do not speak English.¹⁹

H. The First Amendment Rights Of The Petitioners Have Not Been Unconstitutionally Abridged.

The petitioners argue that they are denied educational opportunities and that they are "unable to communicate or understand the language of instruction, these students are foreclosed from any opportunity" to acquire the basic minimal skills "necessary to function in a classroom, let alone to enjoy the rights of speech and of full participation in the political process."²⁰ (P.B. 13, footnotes omitted.)

This is the same issue, again, except that in this case the petitioners contend that the state has an

¹⁹Though not part of the record before the trial court, it should be noted that the district now administers bilingual programs in Chinese, Filipino, Spanish; and, starting in 1973-1974, there will be a Japanese program. In 1972-1973 the district spent nearly 2.5 million dollars on programs intended to provide special assistance (bilingual or ESL) to students who do not speak English. More than 50% of that sum came from local funds.

²⁰This issue was never raised either at the level of the trial court or the Ninth Circuit. This argument raises legal theories which were not advanced to the trial court. The respondents contend that the issue is not properly before this Court. The analysis which follows does not concede the appropriateness of the petitioners' attempt to advance this argument at this stage of the proceedings.

affirmative duty to teach them English so that they can enjoy the full benefits of their First Amendment right to freedom of expression and association.²¹ The answer to this contention is that the First Amendment, like the Fourteenth Amendment, is framed in negative terms.

"Congress shall make no law . . . abridging freedom of speech or of the press or of the right of the people peaceably to assemble, and to petition the Government . . ."

In other words, the Constitution does not impose an affirmative duty on Congress to secure that each and every citizen be able to make maximum use of his First Amendment rights. That this is one of the objectives of universal public education is not to be denied. Whether the state has a duty to cultivate and maximize the verbal faculties of each and every citizen is the very question before this Court; and it is submitted that there is no basis in the First Amendment for establishing that either Congress or the states have any such affirmative duty. That was the gist of the complaint advanced in *Katzenbach v. Morgan*, (*supra*). The complaint in this case is not that the state is affirmatively abridging the petitioners' right to expression. On the contrary, the contention is that in providing for general public education in

²¹Of course, respondents do not consider themselves bound by the First Amendment except insofar as that Amendment's safeguards have been "incorporated" into the Due Process Clause of the Fourteenth Amendment. Respondents do not question that the states under the Due Process Clause of the Fourteenth Amendment are bound by prohibitions similar to those set forth in the First Amendment. *Young v. California*, 308 U.S. 147 (1939), *De Jonge v. Oregon*, 299 U.S. 353 (1937).

English and in failing to provide special instructions to non-English speakers the state has not gone far enough. The state scheme of public instruction does not abridge freedom of expression and, in fact, in the context of the society as a whole, it undeniably expands the capacity of many citizens to exercise their Constitutional rights to freedom of expression. As for the petitioners, the state's scheme of public instruction, if viewed in its worst light, does nothing. It neither abridges nor expands their capacity for self expression. Since there was no active state abridgement of or interference with their First Amendment rights, it is submitted that there is no basis for this Court to conclude that the state has any such affirmative duty. See the discussion earlier on comparing *Katzenbach v. Morgan (supra)* with the instant case. It is apposite and need not be repeated.

In *Rodriguez, supra*, the Court also confronted, at 93 S.Ct. 1299, the appellees' contention that the system of financing public instruction which provided some students with less money for their education also impeded their opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process. After noting that the state did provide at least a minimal opportunity, the Court said:

"Furthermore, the logical limitations on appellees' theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that ill-fed,

ill-clothed, and ill-housed are among the most ineffective participants in the political process and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of *Dandridge v. Williams*, *supra*, and *Lindsey v. Normet*, *supra*." (Citations omitted.)

Once again the petitioners have undeniably demonstrated an urgent need. However, the issue before this Court relates to the existence of a constitutional duty which does not, in fact, rest on a need.

I. Conclusion.

This case can be reduced to the narrow issue of whether on a showing of need arising from a disability neither created, imposed nor perpetuated by state action, the state has an affirmative duty to remedy that disability. In other words, does the Fourteenth Amendment vest in every aggrieved citizen the right to state remedial action merely because the citizen's personal problems prevent him from taking full advantage of an important benefit provided by the state? This question really calls for a reexamination of the social contract and an assessment of our democratic tradition. When the neanderthal man brought his family from his own abode to a common living space and society was erected around the delegation of functions for the purposes of efficiency, no one envisaged that the social order, erected for the mutual protection of all, was bound to cater to the personal difficulties of each.

The function of the state to provide for the general welfare has, needless to say, expanded since the age of pithecanthropus. However, it is an undisputed principle imbedded in our cultural and social heritage and written into the Social Contract that when the organized social order undertakes to solve general social problems, it selects certain members to examine the difficulties and decide how to act. In our democratic tradition those certain members constitute the legislature. The resolution of all social inequities is indeed a laudable and legitimate goal of the legislative branch of the government in the performance of its duty to provide for the general welfare but it certainly is not a constitutional mandate investing the Courts with a *carte blanche* for carrying out utopian reforms.

For these reasons it is submitted that the District Court and the Ninth Circuit properly ruled that there was no constitutional right to special educational treatment, that there was no suspect classification, that the scheme of public instruction to be conducted in the English language is reasonably related to permissible state purposes and finally, that there was no basis in the Constitution for a Court to order the respondents to provide the special instruction sought by the petitioners.

VI. RESPONDENTS' POLICIES ARE NOT IN VIOLATION OF THE CIVIL RIGHTS ACT

The petitioners contend that the respondents' failure to provide them with special instruction constitutes a violation of Section 601 of the Civil Rights

Act of 1964.²² They also argue that the City failed to comply with the regulations of the Department of Health, Education and Welfare, Regulations 45 CFR 80. In addition, they conclude that the City has failed to comply with additional guidelines issued by HEW and with the affirmative action required by those guidelines. The Ninth Circuit ruled that

"Our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act." Appendix, pages 120-121.

It is submitted that the Court below properly resolved the petitioners' claims relating to violations of the Civil Rights Act. Additionally, the respondents contend that their policies do not violate the Civil Rights Act and are in compliance with the guidelines and regulations issued by HEW and promulgated in the Federal Register (Fed. Reg.) and the Code of Federal Regulations (CFR). Alternatively, the respondents argue that should their policies and administration be deemed inconsistent either with regulations, guidelines, or memoranda, etc. of the HEW, or with the Civil Rights Act, then it must be concluded that insofar as those regulations, guidelines, memoranda or statutes either classify as unlawful or require affirmative action relating to, activities or conditions which do not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution, such regulations, guidelines, memoranda, or statutes, etc., are invalid.

²²42 U.S.C. §2000d.

The petitioners have erected a logical house of cards and precariously perched their conclusions on the peak of its steeply pitched roof. Therefore, it is necessary to dismantle their argument in logical order.

The most recent document on which the petitioners rely appears in 35 Fed. Reg. 11595, and in petitioners' Appendix 1A. It is entitled,

"Office of Civil Rights

"IDENTIFICATION OF DISCRIMINATION AND DENIAL
OF SERVICES ON THE BASIS OF NATIONAL ORIGIN."

After identifying its recipients, the memorandum provides:

"Title VI of the Civil Rights Act of 1964, and the Departmental Regulations (45 CFR, Part 80) promulgated thereunder require that there be no *discrimination on the basis of race, color, or national origin . . .*" (Emphasis added.)

Presumably, then, the memorandum was issued pursuant to authority set forth in Title VI of the Civil Rights Act and 45 CFR 80.²³ The language in the Title of the Regulation refers to "discrimination" and "denial" of "services on the basis" of national origin. It is clear, thus, that the regulation relates to activities prohibited by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Then the memorandum refers to:

"common practices which have the effect of denying equality of educational opportunity to Span-

²³These sources will be discussed later. At this point it should be noted that defendants will establish later on that Title VI of the Civil Rights Act was enacted by Congress pursuant to its powers set forth in Section 5 of the Fourteenth Amendment.

ish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from *other national origin-minority groups*, for example, Chinese or Portuguese." The memorandum then identifies its purpose, "... to clarify HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority groups deficient in English language skills."

Finally, the memorandum imposes an obligation to "take affirmative steps to rectify the language deficiency . . . where it [the deficiency] excludes national origin minority group children from effective participation in the educational program offered by the school district." (All the above references are to 35 Fed. Reg. 11595, July 18, 1970, Petitioners' Appendix 1a-3a.)

The question is whether the language of 35 Fed. Reg. 11595 can be held applicable to the respondent San Francisco Unified School District.²⁴ One possible interpretation of the memorandum would embrace all possible situations where a student's language deficiency without regard to its cause impedes his full performance and development in school. The respond-

²⁴Parenthetically it is interesting to note that the petitioners, in their initial complaint, referred only to 33 Fed. Reg. 4850, which imposed an affirmative duty to eliminate discrimination based on race or national origin, and to correct the effects of past discrimination. The respondents are in complete agreement with this regulation. Since no past or present discrimination was alleged or proved, this regulation imposes no affirmative duty on the respondents.

ents submit that this is the improper interpretation for the following reasons:

(1) A reading of the whole memorandum (35 Fed. Reg. 11595) indicates that it was prepared following a Title VI compliance review. The implication was that the memorandum was drawn to deal with situations found to be in violation of Title VI.

(2) The language in the third paragraph of 35 Fed. Reg. 11595 which refers to "practices which have the effect of denying equal educational opportunity" must be read to refer to practices which do in fact constitute a violation of the Fourteenth Amendment rights of students to an equal educational opportunity.

(3) The title of the memorandum demonstrates that it was intended to aid in the "*identification of discrimination and denial of services on the basis of national origin.*" The words "discrimination" and "denial on the basis of national origin" have almost become words of art and in the framework of civil rights, must be understood to refer to activities or policies which violate the Fourteenth Amendment.

(4) 45 CFR 80 and Title VI, of the Civil Rights Act, which provide the statutory and administrative basis for the memorandum only embrace within their prohibition activities which contravene the Fourteenth Amendment (discussed below).

(5) If the language of 35 Fed. Reg., 11595, must unavoidably be interpreted to extend beyond requiring the state to undertake affirmative steps where there

has been unlawful state action at some time, then it is submitted that the director of the Office for Civil Rights exceeded the authority vested in him by Congress in Title VI of the Civil Rights Act.

45 CFR 80 once again talks about "nondiscrimination" and, in Section 80.1, sets forth its purpose:

"The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 hereafter referred to as the 'Act') to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education, and Welfare."

Then, Section 80.3 more specifically defines the discrimination prohibited, providing in subsection (a):

". . . No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies."

As noted earlier, 35 Fed. Reg. 11595 was issued pursuant to the mandate set forth in Title VI of the Civil Rights Act and in 45 CFR 80. It is clear from a careful reading, 45 CFR 80, that its proscription embraces only activities which can be deemed to be in violation of the Equal Protection Clause of the Fourteenth Amendment.

Both 35 Fed. Reg. 11595 and 45 CFR 80 identify their purpose to be the effectuation of Title VI of the Civil Rights Act of 1964.²⁵ Title VI is promulgated in 42 U.S.C. 2000d and 2000d-1, which provide:

2000d: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance.

2000d-1: Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination

²⁵An important conceptual distinction is to be noted. It is conceded that Congress could pass a statute requiring schools receiving federal financial assistance to provide bilingual or other special instruction to non-English speaking students. This would be well within the Congressional prerogative to provide for the general welfare; however, this is not what Congress did. Title VI of the Civil Rights Act was enacted to prohibit activities which constituted violations of the Fourteenth Amendment. Therefore, it is submitted that though Congress could require such affirmative action in all cases as a condition of the federal grant, this is not what Congress has done in the instant case and, therefore, the administrative officials in the executive branch have no power to exact conditions in excess of the Congressional grant.

of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 2000d therefore prohibits exclusion from participation or denial of benefits or discrimination on ground of race, color or national origin when under any program or activity receiving federal financial assistance. Section 2000d-1 allows federal departments to issue rules, regulations or orders of general ap-

plicability to effectuate the provisions of Section 2000d. Therein lies the source of authority for 45 CFR 80 and 35 Fed. Reg. 11595.

The legislative history of Title VI of the Civil Rights Act reveals an unequivocal intention to prohibit actions and policies which constitute violation of the Fourteenth Amendment. Regarding H.R. 7152,²⁶ the House Report summarized Title VI as requiring "nondiscrimination in federally assisted programs."²⁷ The House Report's general statement²⁸ regarding what the legislation is designed to combat notes that "a number of provisions of the Constitution of the United States clearly supply the means 'to secure the rights.'"²⁹

Clearly the petitioners do not contend that the Thirteenth and the Fifteenth Amendments are being violated in the instant case. Title VI was enacted by Congress specifically to enforce the Fourteenth Amendment. The general statement contained in the House Report discussed above is replete with references to unlawful discrimination. In its specific analysis of Title VI the House Report³⁰ states in part: states in part:

²⁶The 1964 Civil Rights Act containing Title VI.

²⁷*U. S. Congressional and Administrative News*, 1964, p. 2392.

²⁸*Ibid.*, pp. 2393-2394.

²⁹Section 2 of the Thirteenth Amendment (abolishing slavery), Section 5 of the Fourteenth Amendment (prohibiting state imposed denials of Due Process or Equal Protection, and Section 2 of the Fifteenth Amendment (prohibiting denial or abridgement of the right to vote on account of race, color or previous condition of servitude) all empower Congress to enforce the particular amendment with appropriate legislation.

³⁰*U. S. Congressional and Administrative News*, 1964, pp. 2400-2401.

"This title [Title VI] declares it to be the policy of the United States that discrimination on the ground of race, color or national origin shall not occur in connection with programs receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to take action to carry out this policy."

The additional majority views of Honorable William M. McCullough, Honorable Jon V. Lindsay, Honorable William T. Cahill, Honorable Garner E. Shriver, Honorable Clark McGregor, Honorable Charles McMathias, and Honorable James E. Bromwell,³¹ emphasize that the Civil Rights Act is not a panacea, but that the bill "... can and will commit our Nation to the elimination of many of the worst manifestations of racial prejudice. . . ."³²

Referring to that portion of the legislation which ultimately became Section 2000d.³³ The above named commentators noted that

"Testimony before this House Judiciary Subcommittee and data gathered by the Civil Rights Commission is available which demonstrates that in many regions of the country citizens are *denied equal benefits from Federal financial assistance programs because of their color.*" (Emphasis added.)

Said Judge Robinson before the House Judiciary Subcommittee regarding the language contained in 2000d,

³¹*Ibid.*, pp. 2488-2510.

³²*Ibid.*, p. 2418.

³³Title VI, Section 601.

"... By this recommendation the Commission will seek remedial, not penal or punitive action. What the Commission had in mind was that the expenditure of Federal funds be made in a manner which would benefit all citizens without distinction on account of race or color. What it had in mind were safeguards against the use of Federal funds in a way that encourages or permits discrimination. The report itself states that the Commission's goal is that all citizens in the United States be assured the full enjoyment of the rights guaranteed by the Constitution."³⁴

It is therefore submitted that the Congressional intent in enacting Title VI of the Civil Rights Act of 1964 was to apply pressure on the states, through the federal government's power to grant financial aid, to eliminate state policies and activities which violate the prohibitions set forth in Section 1 of the Fourteenth Amendment.

Section 706 of Title 5 of the U.S.C.A. deals with the scope of review and provides in pertinent part that

"... the reviewing court shall . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be . . .

* * * *

"(c) In excess of statutory jurisdiction, authority or limitations or short of statutory right; . . ."

It is submitted that Judge Burke ruled properly in concluding that the resolution of the alleged consti-

³⁴*U. S. Congressional and Administrative News*, 1964, p. 2512.

tutional violation also disposed of the Title VI Civil Rights Act. However, if the Court had considered the school policies and actions to be in violation of the HEW regulations, then the judge would have been bound to hold those regulations invalid insofar as they purported to compel the City to take affirmative steps to remedy language disabilities for which the School District was deemed not to be constitutionally responsible.

Section 5 of the Fourteenth Amendment was not intended to invest Congress or the courts with the power to legislate upon subjects which are within the domain of the state legislatures or to impose on the states their view of what constitutes wise economic or social policy. *Dandridge v. Williams, supra*; *In re Rahrer*, 140 U.S. 554 (1891); *Younger v. Harris, supra*, and *Oregon v. Mitchell, supra*. These cases not only confirm the role of the judiciary in our system of separation of powers, but, also, they reaffirm the principle that our federal system is composed of separate states which the framers of the Fourteenth Amendment did not intend to homogenize into an amorphous monolith. And this court has held that it was not the intention of the drafters of the Civil Rights Act that all matters formerly within the exclusive cognizance of the states should become a matter of federal judicial responsibility. *Snowdon v. Hughes*, 321 U.S. 1 (1943). Furthermore, the content of the Civil Rights Act, Title VI, and its legislative history do not support the administrative interpretation and construction of §2000d which the petitioners contend was made by the HEW officials. *Griggs v. Duke*

Power Co., 401 U.S. 424. And administrative action in excess of statutory power must be set aside. Citizens' Committee for *Hudson Valley v. Volpe*, 425 F.2d 67, cert. den. 400 U.S. 949 (1970). It is submitted that the interpretation of the regulation advanced by the petitioners, if accepted, would result in administrative action in excess of the statutory power and, as such, must be set aside. The Civil Rights Act, Title 42, Section 2000d-1 simply has not granted authority to make such regulations. That section merely allows the departments to make regulations to enforce Section 2000d.

In the recent case of *Jefferson v. Hackney*, *supra*, this Court confronted a challenge to certain computation procedures which the State of Texas used in the federally assisted welfare programs. The appellants contended inter alia that the scheme violated the Fourteenth Amendment (discussed in the first part of this brief relating to the equal protection argument). Said the Court, in footnote 19:

"Just as the state's actions here do not violate the Fourteenth Amendment, we conclude that they do not violate Title VI of the Civil Rights Act of 1964 §2000d. The Civil Rights Act prohibits discrimination in federally financed programs. We have, however, upheld the findings of *nondiscriminatory purpose* in the percentage reductions used by Texas, and have concluded that the variation in percentages is rationally related to the purpose of the separate welfare programs. . . . Since the Texas procedure challenged here is related to the purposes of the welfare program, it is not proscribed by Title VI simply because of

variency in the racial composition of the different categorical programs." (Emphasis added.)

Accord, *Goodwin v. Wyman*, 330 F.Supp. 1038 (1971). Essentially the same showing is required to establish a violation of 42 U.S.C.A. §2000d as is needed to make out a violation of the Equal Protection Clause of the Fourteenth Amendment. Likewise it is submitted that since the general scheme of public education in English is reasonably related to the purposes of general public education; it is not proscribed by Title VI simply because some students with language difficulties do not perform to their full potential.

The outlines of this principle were set forth in two cases which when placed in juxtaposition, clearly reveal the critical element. In *Southern Alameda Spanish Speaking Organization v. City of Union City*, 314 F.Supp. 967 (1970), the court concluded that since there was no issue in the case relating to the existence of racial discrimination as to any program or activity receiving federal assistance, then there can be no violation of the Civil Rights Act Section 601 which provides that no person shall, on grounds of race, color or national origin be excluded from participation in or be subjected to discrimination under a program or activity receiving federal financial assistance.

However, in *Gatreaux v. Chicago Housing Authority*, 265 F.Supp. 582 (1967), the Court held that if the dominant factor in the selection of public housing sites was racial concentration, then the decision violates the Constitution and also §2000d of Title 42.

See also *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852, Cert. denied 388 U.S. 911 (1967) which concluded:

“But it [Section 601 of the Civil Rights Act] also states the law as laid down in hundreds of decisions, independent of statute.”

And so the respondents submit that the Civil Rights Act of 1964, Section 601, does constitute a legislative promulgation of the prohibitions set forth in the first section of the Fourteenth Amendment and Section 602 (2000d-1 of Title 42) was intended to authorize and empower federal administrative enforcement of the prohibitions. For these reasons the respondents maintain that *Gatreaux, supra*, and *Southern Alameda County* were correct in their identification of the critical element of discriminatory intent or motivation in a cause of action alleging a violation of the Civil Rights Act of 1964, Section 601. And as in the constitutional analysis presented above, it is not enough that a plaintiff allege and prove that an identifiable minority is “affected” by state legislation in a more burdensome manner than other citizens. The mere incidental hardship which an identifiable insular minority suffers does not amount to a constitutional or federal statutory violation when it is evident and demonstrated that the legislation and procedures in question were enacted, adopted and enforced to serve other important state interests of admitted legitimacy.

Thus, the respondents summarize their arguments relating to the Civil Rights Act as follows; first, the language in all the HEW regulations, if properly

interpreted, cannot be held applicable to any policies of the respondents where no violations of the Fourteenth Amendment have been shown. Should that language be deemed applicable to respondents' policies, even though no constitutional violations have been shown, then the regulations are in excess of the delegation of authority set forth in Title VI of the Civil Rights Act. Furthermore, that Act was intended only to prohibit practices and policies which constituted violation of the Constitution and Congress, acting pursuant to the delegation of power set forth in the Thirteenth, Fourteenth and Fifteenth Amendments could not have proscribed activities or policies which did not violate those amendments. Finally, this Court has confirmed the principle that the violation of the Civil Rights Act is established where the requirements for establishing a violation of the relevant constitutional provisions have been satisfied. Therefore, it is submitted that both the Ninth Circuit and the trial Court properly ruled that the respondents had not violated the statutory rights of the petitioners as set forth in Title 42, Sections 2000d and 2000d-1.

VII. CONCLUSION

The petitioners would have this Court believe that the respondents have done nothing to solve the educational problems posed by students from a non-English speaking environment. The impression conveyed by the petitioners is that the respondents have totally ignored and refused to deal with a serious problem.

This is not the case. Unfortunately the petitioners have attempted to obfuscate the issue in this case by charging the respondents with callous intransigence. The record before the trial court and Judge Burke's finding repudiate this contention. Respondents are committed, within the limits of their resources and with regard to the other urgent demands made on those resources to provide bilingual or ESL instruction to those students who need special assistance. The respondents' concern in this case lies in the domain of the alleged existence of constitutional duty. Should this Court affirm the rulings of the lower Court the respondents will only continue the already prodigious and continuously growing undertaking of providing bilingual instruction not only in Chinese but also in Spanish, Filipino and Japanese. The respondents are committed to quality education for all their students and they submit that they are best able to determine how to provide that quality education and maximize the utility of the public resources available for expenditure in public education.

In *San Antonio Independent School District v. Rodriguez, supra*, the court said, at 1299:

"The equal protection clause does not require 'absolute equality or precisely equal advantages in education and absent invidious discrimination, the fact that there are disparities in educational programs does not violate that clause where the system provides' each child with an opportunity to acquire the basic minimum skills necessary.

..."

It is submitted that the respondents provide that opportunity. They are not bound to show that the opportunity provided to each student is pedagogically tailored to suit his particular educational problems but, rather, the mandate is broad and general. If a state chooses to provide education, it must present a scheme which is founded in reason and legitimately related to the general objective of public instruction. This, and more, the respondents have done and neither the Constitution nor the Civil Rights Act requires more.

Dated, San Francisco, California,

October 1, 1973.

Respectfully submitted,

THOMAS M. O'CONNOR,

City Attorney of the City and County of San Francisco,

GEORGE E. KRUEGER,

Deputy City Attorney of the City and County of San Francisco,

BURK E. DELVENTHAL,

Deputy City Attorney of the City and County of San Francisco,

Attorneys for Respondents.

(Appendices Follow)

Appendix A

**In the United States District Court
For the Northern District of California**

Wendy Berkelman, et al.,	Plaintiffs,
vs.	
San Francisco Unified School District, et al.,	Defendants.
Save Lowell Committee, et al.,	
	Intervenors.

[Filed Dec. 19, 1972]

**MEMORANDUM OPINION
AND ORDER OF
SUMMARY JUDGMENT**

1. This case is brought under 42 U.S.C. §1983 et seq. and challenges the policy of the Board of Education of the San Francisco Unified School District in maintaining Lowell High School, one of the District's Senior High Schools, as an academic high school. Plaintiffs' complaint alleges (1) that the operation of an academic high school, without reference to the racial mix in it or in other high schools in the District, is per se unlawful by reason of the fact that the quality and extent of the curriculum offered at that school is different from that available at other high schools in the District and is offensive to the remaining students within the system because its existence

causes severe intellectual and emotional harm; (2) that the standard of admission to that academic high school, past academic achievement, is unconstitutional because the even-handed application of it results in there being a racial and economic mix at the school different from the mix which exists in the District at large; (3) that the School District's policy of admitting approximately equal numbers of boys and girls to the school discriminates against girl applicants because the application of that policy results in the school's admitting male students with grade point averages .25 (on a 4-point scale) lower than the grade point averages of the female students it admits: and (4) plaintiffs believe that the District's allocation of educational resources has unfairly favored Lowell over the other institutions within the system.

The case is before the Court on Defendant's Motion to Dismiss or, in the alternative, Motion for Summary Judgment and Plaintiffs' Motion for Preliminary Injunction and Motion for Partial Summary Judgment as to their second, third and fourth causes of action.¹

Intervenors have joined with defendants in moving to dismiss this suit and for summary judgment.

¹Plaintiffs have not moved for summary judgment with respect to their first and fifth causes of action. The first cause of action is based upon the proposition that the maintenance of Lowell as an academic high school is per se unconstitutional because the quality and extent of the curriculum at Lowell is different from that made available to the students in the District's comprehensive high schools. Plaintiffs' fifth cause of action is for declaratory relief. There are no material facts with respect to those two causes of action which are in dispute or which are not among the facts which are the subject of plaintiffs' motion for summary judgment with respect to their second, third and fourth causes of action.

Defendants' original motions were filed on January 17, 1972 and were set for hearing on February 18, 1972. The hearing was continued at plaintiffs' request to permit further discovery. There was a further hearing in April, during which plaintiffs requested that discovery remain open, and the Court granted that request. At that April hearing, plaintiffs moved to file an amended complaint; defendants stipulated to that motion being granted and plaintiffs did file an amended complaint, with defendants' motions renewed as to said amended complaint. A final hearing was held on July 7, 1972. On that date all parties were given the opportunity to present final argument and to present live testimony. Final argument was heard from all parties, but no party elected to present live testimony nor was any request made for additional time for discovery, or to file any further amended pleadings. All of the pending motions were, on that date, submitted.

There are no disputed issues of material facts. The cross-motions for summary judgment are based upon that premise. The Court is now in a position to render a final decision in this case.

2. *The Parties.*

Plaintiffs are students in the San Francisco Unified School District who are not qualified to attend Lowell High School under its admissions policy, or who are qualified to go there and have elected not to. Plaintiffs allege that they represent black and Spanish-speaking students, students of "low-economic

backgrounds", and female students. (Amended Complaint, pp. 3-5).

Defendants are the San Francisco Unified School District, the members of the San Francisco Board of Education, and the Superintendent of Schools.

Intervenors are (1) the Save Lowell Committee, an association of alumni and alumnae of Lowell High School, parents of past and prospective students there, and other San Francisco residents "interested in preserving and protecting Lowell High School as an academic institution" (Intervenors' Answer, p. 2); and (2) students who are or will be qualified to go to Lowell under its admissions policy and who have elected to go there. The intervening students include blacks, Spanish-speaking students and students of low economic backgrounds. (Intervenors' Answer, pp. 3-4).

The San Francisco Unified School District is a unified school district. It operates 11 senior high schools. (District's Answers to 1st Interrogatories, Ex. O; Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Ex. 1).

The Seven Comprehensive Schools.

Seven of the 11 high schools are "comprehensive" high schools to which students are assigned "on the basis of their residence." (Amended Complaint, pp. 6-7; Dist's Ans. to 1st Interrogs., Ex. O).

All of the comprehensive high schools "offer a college preparatory program which meets the admission

requirements of the University of California." (Dist. Memo. I, p. 17).² All the comprehensive high schools send graduates to institutions of higher education. (Dist's. Ans. to 2nd Interrogs., Ex. B, Ex. E).

The Three Special Schools Other Than Lowell High School.

The School District operates three special high schools other than Lowell High School: Opportunity High School, whose function "is to serve students who are not succeeding in conventional high schools;" Samuel Gompers High School, which serves working students who wish to attend school part time and foreign born students "who do not communicate in English well enough to learn effectively in a regular District high school;" and John O'Connell vocational high school, which offers vocational and general educational curricula. (Dist's Ans. to 1st Interrogs., Ex. O; Amended Comp., p. 6). Plaintiffs do not challenge the District's right to operate those special schools.

Lowell High School.

Lowell High School "was established and is operated as the District's academic high school." (Amended Comp., p. 7; Dist's Ans. to 1st Interrogs., Ex. O). Lowell is non-districted," and is therefore open to all students in the District regardless of

²The facts set forth in that memorandum are sworn to in an affidavit of Barton Knowles, which was served and filed with the memorandum.

residence. (Dist's 1st Ans. to Interrogs., Exs. B-1, B-4 and O; Ptf. Memo. in Support, p. 10).³

Lowell offers a curriculum which includes advanced academic courses, some of which are not available at other high schools in the City. That, as plaintiffs put it, "of course is the nature and meaning of an exclusive academic high school." (Ptf. Memo in Support, p. 28; Amended Comp., p. 7).

4. *Lowell's Admissions Policy.*

Lowell admits students on the basis of their past academic achievement in junior high school. (Amended Comp., pp. 6-9; Dist's Ans. to 1st Interrogs., Exs. A and B). Lowell admits students "solely" on that basis (Ptf. Memo in Support, p. 11). Plaintiffs concede that the standard is neutral on its face, and do not contend that it has been administered unfairly.⁴ (Ptf. Memo in Support, pp. 7, 11, 24, 32, 34, 36, 37). Plaintiffs complain that the result of the application of that admissions standard is that most of the "high academic achievers" and "bright and

³Lowell was moved to the southwest corner of the City in 1961. (Amended Comp., p. 15). More than 40% of Lowell's students come from residences in the eastern half of the City. (Dist. Memo I, pp. 25-26). In addition, Lowell's student body has a substantial percentage of Chinese students. The two junior high schools closest to Chinatown, Francisco and Marina, send a large number of students to Lowell. (Dist's Ans. to 1st Interrogs., Ex. P-3; Dist's Ans. to 2nd Interrogs., Ex. F-1; Ptf. Memo. in Support, Ex. 1). Those two junior high schools appear to be further from Lowell High School than any other junior high schools in the City. (Dist's Ans. to 2nd Interrogs., Ex. F-1).

⁴Lowell's admissions standard and changes made in it between 1966 and 1971 are explained at Dist's Ans. to 1st Interrogs., Exs. A, B, B-3, C, C-1, I.

motivated students" in the District go to Lowell. (See Amended Comp., p. 20; Ptf. Memo in Support, p. 7).

5. *The Pilot Minority Program and the Policy of Admission of Equal Numbers of Girls and Boys.*

In 1970 the District instituted a "pilot minority group" program according to which all Spanish-speaking and black applicants to Lowell whose grade point averages were with .5 (on a 4 point scale) of the cut-off point for other applicants were admitted to Lowell. (Dist's Ans. to 1st Interrogs., Nos. 45(c), 55-57, and Ex. U). In 1971, the percentage of black and Spanish-speaking applicants thereby accepted out of those applying to Lowell was 70% and 85% respectively, higher than the percentages with respect to any other group of applicants. (Ptf. Memo in Support, p. 28).⁵

In 1970, the District also instituted a policy which calls for Lowell to admit approximately equal numbers of boys and girls. (Dist's Ans. to 1st Interrogs., Ex. O). As a consequence of the operation of that policy, the cut-off point for female applicants admitted to Lowell in 1970, 1971 and 1972, was .25 higher than for males. (Amended Comp., pp. 8-9).

The District's purpose in admitting black and Spanish-speaking students with grade points .5 less than the cut-off with respect to other applicants was "to improve the racial balance of the Lowell student

⁵Enrollment of blacks and Spanish-speaking people increased during the period 1966 to 1971. (Dist. Memo I, p. 27; See also Amended Comp. p. 6).

population." (Dist's Ans. to 1st Interrogs. No. 45(c), Ex. U). The District's purpose in admitting boys with grade points .25 less than girls was to achieve an approximately equal balance between boys and girls in the Lowell student population. (Dist's Ans. to 1st Interrogs. Ex. O; Dist's Ans. to Requests for Admissions. No. 3). Plaintiffs attack the second of those two policies, but not the first.

6. *The Racial Make-Up of Lowell High School.*

This is not a case of whites on the one hand and blacks or Spanish-speaking people on the other. Plaintiffs have set up the group "white and/or Asian" on the one hand, and blacks and Spanish-speaking persons on the other. (Amended Comp., p. 14; Memo in Support, p. 5).

Less than one-half of Lowell's student body is white (Ptf. Memo in Support, Ex. 1), and there is a substantial mix of races at Lowell. The percentages of various groups at Lowell as compared with the percentages of such groups in the District at large are these: Twenty-nine and eight-tenths percent of Lowell's students are Chinese; the District all-high school percentage is 17.9%. Three and eight-tenths percent of Lowell's students are Filipino; the District all-high school percentage is 4.5%. Three and two-tenths percent of Lowell's students are Japanese; the District all-high school percentage is 1.9%. Five and two-tenths percent of Lowell's students are Spanish-speaking; the District all-high school percentage is 13%. Seven and five-tenths percent of Lowell's stu-

dents are black; the District all-high school percentage is 25.9%. (Ptf. Memo in Support, Ex. 1, pp. 1-2).⁶

In 1970 the School District instituted its policy with respect to admitting approximately equal numbers of girls and boys at Lowell. From 1962 to 1965, when that policy was not in effect, the percentage of girls admitted to Lowell ranged from 49.9% to 53.7%, with the exception of the spring of 1964, when the percentage was 57.6%. From 1966 through 1969, when that policy was still not in effect, the percentage of girls admitted to Lowell High School increased: the percentages ranged from 49.7% to 60.8%, and the percentage was 56% or higher during 4 of the 8 semesters which occurred during those years. From 1970 to 1972, after the policy was put into effect, the percentage of girls admitted to Lowell ranged from 48% to 55%, approximately the percentage which obtained between 1962 to 1965. (Dist's Ans. to 2nd Interrogs., No. 7).

8. *Female v Male Achievements in Lower Grades.*

The School District has cited treatises to support the proposition that girls achieve better grades than boys in the first nine grades of school, while boys catch up during high school or later. (Dist's Ans. to 1st Interrogs., Nos. 61, 62). According to the School

⁶Plaintiffs describe Washington High School as a well-integrated" school. (Amended Comp., p. 7). Lowell has a higher percentage of Spanish-speaking students, one of the two racial groups with respect to which plaintiffs complain, than Washington does. (Ptf. Memo. in Support, Ex. 1).

District, that fact is "common knowledge among educators and those who have studied in this area. . ." (Supplemental Response No. 2 to Plaintiffs' Requests for Admissions). There is a body of literature, some of which is cited and relied upon by plaintiffs' affiants Amster and Tyler, which is in accord with that statement of the School District's. Quotations from the treatises cited by plaintiffs' affiants are set forth in Intervenor's Memorandum Re: Plaintiffs' Affiants' Treatises Re: Sex Differences.

Literature cited and written by plaintiffs' affiant Tyler also states that "generally, American educators have considered that the advantages of coeducation outweigh its disadvantages." (Quoted at Intervenor's Memorandum Re: Plaintiffs' Affiants' Treatises Re: Sex Differences, p. 5).

9. *The Issues in The Case, and The Conclusions With Respect To Them.*

There are four issues:

(1) *The first issue.*

Plaintiffs allege that the operation of an academic high school, without reference to the racial mix in it or in other high schools in the District, is per se unlawful by reason of the fact that the quality and extent of the curriculum offered at that school is different from that available at other high schools in the District,⁷ and because its very existence may cause intellectual and emotional harm to excluded students.

⁷Plaintiffs seem to have abandoned that contention. (Ptf. Memo in Support, p. 28).

xi

The issue is: is it within the District's discretion to operate an academic high school which offers a curriculum different from that offered in other high schools in that District.

Conclusion. It is constitutionally within the School District's discretion to do so, and the constitution does not prohibit it from doing so. *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *King v. Saddleback Junior College Dist.*, 455 F.2d 932 (9th Cir. 1971); *Sando v. Alexandria City School Board*, 330 F.Supp. 773, 775 (E.D. Va. 1971); *Sims v. Board of Education of Independent Sch. Dist.*, No. 22, 329 F.Supp. 678, 690 (D.N. Mex. 1971); *Brown v. Educational Testing Service*, No. C-71-2029 (N.D. Calif. 1971, the Honorable Judge Zirpoli presiding).

(2) *The second issue.*

Plaintiffs allege that the standard of admission to Lowell, past academic achievement, is unconstitutional because the even-handed application of it results in there being a racial and economic mix at Lowell different from the mix which exists in the District at large. Memo in Support, pp. 24, 37). That standard of admission is neutral on its face, and there is no charge that the School District does not apply it fairly or that the School District intends to discriminate by its use. Plaintiffs' position is that "the absence of discrimination on the part of District school officials is immaterial," (Ptf. Memo in Support, p. 24), and that "the absence of allegations of

intentional or purposeful discrimination on the basis of race or wealth in plaintiffs' complaint is immaterial." (Ptf. Memo in Support, p. 37).

The issue is: is it within the School District's discretion to admit students to an academic high school on the basis of past academic achievement where the equal application of that standard results in the school's having a larger or offensive to excluded students? (Sic).

Conclusion. It is constitutionally within the School District's discretion to do so, and the constitution does not prohibit it from doing so. *Keyes v. School District No. 1*, 445 F.2d 990, 999 (10th Cir. 1971), *cert. granted*, 92 U.S. 707 (1971); *Gomperts v. Chase*, 329 F.Supp. 1192, 1196 (N.D.Calif. 1971, the Honorable Judge Schnacke presiding); *Bell v. School City of Gary, Indiana*, 324 V. 2d 209, 213 (7th Cir., 1963) *cert. denied*, 377 U.S. 924 (1964); *Jones v. School Board of City of Alexandria*, 278 F. 2d 72, 75 (4th Cir. 1960); *Carter v. Green County*, 396 U.S. 320 (1969); *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101 (1958).^a

(3) *The third issue.*

The School District's policy is to admit approximately equal numbers of boys and girls to Lowell High School. To that end, Lowell admits the approximately 375 boy applicants with the highest grade

^aPlaintiffs' cases and arguments are dealt with at length in Memorandum of Points and Authorities of Amici Curiae in Reply to Plaintiffs' Memorandum, dated April 25, 1972.

point averages, and the approximately 375 girl applicants with the highest grade point averages. The lowest grade point averages of the boys thereby admitted is .25 lower than the lowest grade point averages of the girls thereby admitted. Plaintiffs complain that the operation of the policy to admit equal numbers of boys and girls thereby discriminates against girls.

The issue is: is it within the School District's discretion to put into effect a policy to admit approximately equal numbers of boys and girls to a coeducational academic high school where the application of that policy results in the school's admitting male students with grade point averages .25 (on a 4-point scale) lower than the grade point averages of the female students it admits?

Conclusion. It is constitutionally within the School Board's discretion to do so, and the constitution does not prohibit it from doing so. *Jefferson v. Hackney*, 40 L.W. 4585, 4588-89 (Sup. Ct. May 30, 1972). *Rinaldi v. Yeager*, 384 U.S. 305, 16 L.Ed. 2d 577, 86 S.Ct. 1497; *Reed v. Reed*, 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (November 22, 1971); *Eslinger v. Thomas*, 4 F.E.P. Cases 611, 617 (D.So. Carolina 1971).

This court has been unable to find a logical basis for plaintiffs' acceptance of the District's policy of admitting black and Spanish-speaking students to Lowell if their grade point averages were within .5 (on a 4 point scale) of the cut-off point for other applicants. It would seem that if a policy designed to establish a balance between the sexes is unconsti-

tutional the analogous policy designed to balance the racial mix of students by identical means (lower entrance requirements) would be equally unlawful.

(4) *The fourth issue.*

Have defendants favored Lowell in unconstitutional fashion through the allocation of educational resources to Lowell and to the disadvantage of other institutions within the system?

Conclusion. The method and extent of distribution of educational resources is a matter so peculiarly within the concern of local governmental units that, in the absence of evidence which would even suggest discrimination purpose, we deem it improper for a federal court to attempt to administer such matters. Moreover, we do not believe that it was ever the intention of the authors of the Civil Rights Act to suppose that the district courts should function so as to supervise the manner in which local school districts distribute books or assign teachers. We therefore hold that plaintiffs have not stated any cause of action in this respect.

All sides put the questions in this case in strong language. Plaintiffs say that Lowell "siphons off" high achieving students, and that that hurts their comrades who are left behind. Defendants say that victory for plaintiffs would be a blow for mediocrity, and nothing else. Intervenor says Lowell is open to everyone of every race and every creed; that Lowell provides an opportunity to those who achieve; that in a land of opportunity that opportunity ought to be

provided too; and that if plaintiffs were to prevail that opportunity would be gone for everyone.

This Court need not decide upon the wisdom of the School District's policies with respect to Lowell. The issue before this Court is whether those policies are constitutionally within the School District's discretion. This Court has decided that they are.

Plaintiffs' motion for a preliminary injunction is denied for each of these independently sufficient reasons: (1) for lack of showing of irreparable injury; (2) for lack of equity; (3) because plaintiffs have not shown a reasonable probability that they will prevail on the merits.

Plaintiffs' motion for summary judgment as to the second, third and fourth causes of action is denied. Defendants' motion for summary judgment is granted and the action is dismissed.

Dated: December 18, 1972.

/s/ Lloyd H. Burke
U.S. District Judge



Appendix B

In the Supreme Court of the State of California

In Bank

L.A. 30079

(Super. Ct. No. C 1772)

Antonia Guerrero, et al.,	}
Plaintiffs and Appellants,	
vs.	
Robert Carleson, as Director, etc.,	
et al.,	
Defendants and Respondents.	

[Filed July 30, 1973]

OPINION

Plaintiffs appeal from an order denying their application for a preliminary injunction prohibiting the directors of the State Department of Social Welfare and the Los Angeles County Department of Public Social Services from reducing or terminating welfare payments to recipients who defendants know are literate in Spanish but not in English, unless notice of such reduction or termination was given in the Spanish language.

(SEE DISSENTING OPINION)

The sole issue is whether the welfare authorities are compelled by the Constitution to prepare such notices in Spanish. We conclude that although in appropriate cases the use of Spanish in these and similar notices would be desirable and should be encouraged, it does not rise to the level of a constitutional imperative.

The named plaintiffs are three individuals¹ who had been receiving Aid to Families with Dependent Children (AFDC), a federal-state-county funded categorical assistance program. (42 U.S.C. § 601 et seq.; Welf. & Inst. Code, § 11200 et seq.) Under applicable regulations, recipients of such assistance are entitled to receive "timely and adequate" notice of any proposed reduction or termination of benefits. "Timely" is defined to require that the notice be mailed to the recipient at least 15 days before the action is taken; "adequate" means that the notice must include, inter alia, a written explanation of the reasons for the proposed action, of the recipients' right to request a "fair hearing," and of the fact that benefits will continue to be paid throughout the hearing period if the request for the hearing is made within 15 days. (45 C.F.R. § 205.10; State Department of Social Welfare, Manual of Policies and Procedures: Eligibility and Assistance Standards, § 22-000 et seq. (hereinafter SDSW Manual).)²

¹A welfare rights organization is also joined as a party plaintiff. For convenience, however, the word "plaintiffs" as used herein will refer to the individual plaintiffs only.

²The request may be made after expiration of that period, but in such event the reduction or termination of benefits will be effective throughout the review process.

The complaint alleged that defendants sent notices of reduction or termination of benefits in the English language to plaintiffs; that plaintiffs were unable to read such notices because they are literate only in Spanish; and that plaintiffs failed for this reason to request a fair hearing within the appropriate period, resulting in immediate reduction or termination of their benefits. Although constituting a general denial of plaintiffs' right to relief, the answer admitted that defendants did print some welfare forms in Spanish. It was also stipulated between the parties that the Los Angeles County welfare authorities knew the individual plaintiffs in this case did not speak or read English but did speak and read Spanish; that the authorities routinely make an effort to determine if a recipient is literate in Spanish but not in English; and that if it is learned such is the case, the language handicap is conspicuously noted on the recipient's file.

Plaintiffs' contention—that defendants are constitutionally mandated to give reduction or termination notices in Spanish to those welfare recipients known to be literate in that language but not in English—is based primarily on the due process clause. Plaintiffs concede there is no direct authority for this proposition, but rely rather on *Goldberg v. Kelly* (1970) 397 U.S. 254, and its progeny. In *Goldberg* the United States Supreme Court held the due process clause requires that a welfare recipient be afforded an evidentiary hearing before as well as after termination of benefits. In the course of its opinion the court observed that the recipient must be

given a "timely and adequate" hearing notice (*id.* at p. 267), but did not spell out the contents thereof in any detail. The notice actually furnished under the New York City law challenged in *Goldberg* consisted of a letter to the recipient followed by a conference with a caseworker. Of this procedure the court merely said, "Nor do we see any constitutional deficiency in the content or form of the notice." (*Id.* at p. 268.) Despite the fact that New York City has a large Spanish speaking population,³ there is no indication the notice was given in that language to recipients who were literate only in Spanish. Certainly the high court did not hold in *Goldberg* that a termination notice to Spanish speaking recipients is constitutionally inadequate unless it is prepared in that language.

Seeking additional support, plaintiffs turn to both a general and a specific authority on the law of notice. The former is *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, from which plaintiffs quote certain well-known passages on the adequacy of notice necessary to satisfy due process.⁴ We have no quarrel with the general principles there enun-

³In addition, the recipients individually named in the opinion (*id.* at p. 256, fn. 2) bore Spanish surnames.

⁴"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations.] The notice must be of such nature as reasonably to convey the required information [citation], and it must afford a reasonable time for those interested to make their appearance. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (*Id.* at pp. 314-315.)

ciated, but they are of little assistance in solving the particular problem at hand. Whether the notice here given was calculated "under all the circumstances" to convey the required information obviously depends on an appraisal of those circumstances, an inquiry we shall pursue *infra*.

The specific authority relied on by plaintiffs is *Covey v. Town of Somers* (1955) 351 U.S. 141, in which a notice of judicial foreclosure for delinquency in paying real property taxes was sent to a property owner whom the authorities knew was mentally incompetent and unable to understand the meaning of any such communication. Shortly after foreclosure the property owner was certified to be a person of unsound mind and was committed to a state hospital for the insane, and a guardian of her person and property was appointed. Reversing the foreclosure judgment, the United States Supreme Court quoted the foregoing language of *Mullane* (*ante*, fn. 4) and ruled that "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement [of due process]." (*Id.* at p. 146.)

We agree with this application of the *Mullane* principles, but we cannot fairly equate plaintiffs' knowledge of Spanish rather than English with an unsoundness of mind justifying appointment of a legal guardian. An incompetent may be unable to understand an official notice no matter how it is explained to him. By contrast, the plaintiffs in the case at bar are in full possession of their mental

faculties and are admittedly literate in Spanish; accordingly, they are able without question to understand a *translation* of the notice into that language. The issue, therefore, is whether governmental agencies can reasonably believe that upon receiving the notice plaintiffs will seek and obtain such a translation.⁵

The United States is an English speaking country. Despite California's early Spanish culture, the language of our state government has long been that of the waves of American settlers who migrated here when California joined the Union. Although a declaration that all official writings shall be in the English language (former Cal. Const., art. IV, § 24) was deleted as surplusage in the 1966 revision of our Constitution, section 8 of the Welfare and Institutions Code still provides, as do many of our codes, that "Whenever any *notice*, report, statement, or record is required or authorized by this code, it shall be made in writing *in the English language*." (Italics added.) Justice Holmes declared a half-century ago "it is desirable that all citizens of the United States should speak a common tongue." (*Meyer v. Nebraska* (1923) 262 U.S. 390, 412 (dissenting opinion).) And

⁵It may be noted in passing that plaintiffs fail to answer a preliminary issue raised in defendants' brief: learning a new language is a process, not an event. When a non-English speaking person is exposed to the English language, whether by formal study or simply by living in an English speaking environment, he will ordinarily pass through a long gradation of proficiency beginning with the time he knows only his native tongue until he becomes fully bilingual. At what point in that scale does "literacy" in English start and plaintiffs' claimed right to notices in their own language end?

this court recently recognized that "The state interest in maintaining a single language system is substantial. . . ." (Castro v. State of California (1970) 2 Cal.3d 223, 242.)

It is a truism that life is more difficult in an English speaking country for a person who does not speak English; indeed, it would likewise be more difficult for an American living in Mexico who does not speak Spanish. But the difficulty is not limited to understanding a notice of reduction or termination of welfare benefits. It may be felt, in addition, each time the person finds it necessary to deal with fellow citizens—e.g., when he seeks to rent an apartment or buy a house, to purchase food at a grocery or clothing at a department store, to obtain medical care, or to apply for a job. It may also be felt whenever the person has a need to deal with the government or its agencies—e.g., when he seeks to apply for immigration or citizenship, to obtain a driver's permit, to be licensed to conduct a business, to fill out tax forms, or to qualify for social security or unemployment insurance benefits. The government may therefore reasonably assume that such individuals experience strong and repeated incentives either to learn the English language or to develop a reliance on bilingual persons who can translate for them when necessary.

It is also reasonable to assume that in contemporary urban society the non-English speaking individual has access to a variety of such sources of language assistance. To begin with, he may turn to members of his family, friends, or neighbors, who were either

born in this country or received some schooling here.⁶ If these prove inadequate or unavailable, he may contact representatives of governmental agencies⁷ or private organizations devoted to (1) counselling immigrants, (2) assisting particular nationalities, linguistic groups, trades or professions, (3) protecting individual rights to welfare or other governmental benefits, or (4) furnishing legal aid to the poor.⁸

Finally, the government may reasonably assume that the non-English speaking individual will act promptly to obtain such assistance when he receives the notice in question. We have examined the various forms of notice employed in this case: each is printed on letterhead of the Department of Social Services of Los Angeles County; each is personally addressed to the individual plaintiff, by name, address, and case number; each is obviously an official communication, with boxes checked and blanks filled in by hand; and each is dated and signed by a social worker or similar departmental representative. Plaintiffs repeatedly emphasize that welfare payments play a crucial role in their daily lives. We have no doubt this is so.

⁶Thus the social worker assigned to the case of Mrs. Varela, one of the plaintiffs in this proceeding, declared in an affidavit that his client had at least three teenage children in her household who speak and read English, and who heard the explanation given to Mrs. Varela concerning her pending reduction in benefits.

⁷For example, the social workers assigned to the cases of two of the present plaintiffs each declared in affidavits that they speak Spanish fluently and gave lengthy explanations in that language to their clients concerning their pending reductions in benefits.

⁸Thus plaintiff Varela declared in her affidavit that she took her notice of reduction in benefits to the "State Service Center" in Los Angeles where a law student explained its meaning in Spanish and helped her prepare papers requesting a hearing.

For the same reason, however, it may fairly be assumed that a welfare recipient would not be so disinterested in his family's livelihood as to simply ignore an official document delivered in the mail which has every appearance of relating to his right to receive public assistance payments.

After reciting the above-quoted (*ante*, fn. 4) demands of the due process clause on governmental notices, the *Mullane* court explained (at pp. 314-315 of 339 U.S.): "But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' [Citations.]" In view of the foregoing "practicalities and peculiarities" of the case at bar, we conclude that it is not unreasonable for the state to expect that persons such as those in plaintiffs' position will promptly arrange to have someone translate the contents of the notice here challenged.⁹ Accordingly, prior governmental preparation of that notice in Spanish is not a constitutional imperative under the due process clause.

In somewhat desultory fashion plaintiffs also contend the present system violates equal protection principles. It is argued that to send notices of re-

⁹It is apparent that such persons, by definition, were able to obtain whatever assistance was necessary to permit them to qualify for welfare benefits in the first place.

duction or termination of welfare benefits in English to recipients known not to be literate in that language is arbitrarily to discriminate against them by creating "a class of recipients who are to be denied aid without being duly and properly informed of the same." The argument begs the question. If, as we hold herein, the notice as now given is constitutionally adequate under all the circumstances, plaintiffs are not denied "due" and "proper" information affecting their right to aid.

Plaintiffs' reliance in this connection on *Castro v. State of California* (1970) *supra*, 2 Cal.3d 223, is misplaced. We there hold it would violate the equal protection clause to apply the English literacy voting qualification (former Cal. Const., art. II, § 1) to persons who are literate only in Spanish, yet have access to substantial sources of political information in that language. In so holding, nevertheless, we specifically rejected any suggestion that the state was required by the equal protection clause to provide such persons with ballots and election materials *printed in Spanish*: "Whether such a radical reconstruction of our voting procedures is constitutionally compelled, however, is a separate question. It is clear that the goal of efficient and inexpensive administration, while praiseworthy, cannot justify depriving citizens of fundamental rights. But this does not imply that the state must not only provide all qualified citizens with an equivalent opportunity to exercise their right to vote, but must also provide perfect conditions under which such right is exercised."

... California is not required to adopt a bilingual electoral apparatus as a result of our decision today that it may no longer exclude Spanish literates from the polls. The state interest in maintaining a single language system is substantial and the provision of ballots, notices, ballot pamphlets, etc., in Spanish is not necessary either to the formation of intelligent opinions on election issues or to the implementation of those opinions through the mechanics of balloting. It reasonably may be assumed that newly enfranchised voters who are literate in Spanish can prepare themselves to vote through advance study of the sample ballots *with the assistance of others capable of reading and translating them.*" (Italics added.) (*Id.* at p. 242.)

Castro can of course be distinguished on its facts, but the foregoing reasoning is equally applicable here. Indeed, we are faced with an a fortiori case: just as we recognized that our holding in *Castro* "will apply to any case in which otherwise qualified prospective voters, literate in a language other than English, are able to make a comparable demonstration of access to sources of political information" (*ibid.*), so also the rule sought by plaintiffs herein would reach far beyond the present facts. As plaintiffs candidly concede, a decision in their favor could not properly be limited to the AFDC program and the Spanish language, but would also apply (1) to Spanish speaking recipients under any of the other half-dozen categorical assistance programs and (2) to any other language—Chinese or Japanese, Russian or

Greek, Filipino or Samoan—in which a non-English speaking recipient of such assistance was known to be illiterate, regardless of how small that language group might be.

In addition, it is difficult to see why such a rule would not also extend to any and all official communications to the public required to satisfy due process of law, whether it be summonses, citations, subpoenas, tax forms, delinquency or eviction or foreclosure notices, announcements of public hearings—or, contrary to our assertion in *Castro*, ballots and election materials. Thus in *Carmona v. Sheffield* (N.D. Cal. 1971) 325 F.Supp. 1341, *affd. per curiam* (1973) _____ F.2d _____, the federal district court dismissed as untenable an action by Spanish speaking citizens complaining they were denied equal protection because the state administered its unemployment insurance program in English only. The court said (at p. 1342): “In essence, plaintiffs’ contention would require the State of California and, presumably, all other States and the Federal Government to provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official

business, including the proceedings and enactments of Congress, the Courts and administrative agencies, would become all but impossible. The application of Federal and State statutes, regulations and proceedings would be called into serious question." Again the case may be distinguished on its facts, but its reasoning is apposite to our problem. (Cf. also *Lau v. Nichols* (9th Cir. 1973) 472 F.2d 909.)

We close by taking notice of certain rules and practices of defendant welfare authorities on the subject of adequate communication. In a basic policy declaration the State Department of Social Welfare has fully recognized the importance of communicating whenever possible in Spanish with recipients who speak only that language.¹⁰ Other regulations require

¹⁰"The basic responsibility for providing prompt aid and service obviously includes effective communication. Many counties have large Spanish surname populations. For many of these people, Spanish is their primary language and English (if they speak it at all) is a second language. It is essential that documents explaining appeal rights be available in both English and Spanish in these counties. These documents should not only inform the client of his fair hearing rights but also of legal or related services in those counties where they are available.

"Communication is improved when clients see themselves reflected in agency personnel. Issues growing out of misunderstanding will be reduced if the client's expectancy of being understood is increased because there are people in the department who not only speak his language but who have similar backgrounds and are sensitive to his problems.

"Many counties are moving in this direction. They are developing forms and informational materials in Spanish and arranging Spanish language instruction for staff in the department on department time. Wherever possible, many counties are hiring qualified professional and clerical staff representative of minority groups. In addition, however, long-range planning will be necessary for counties to adequately increase staff proportion of both Spanish surname and other significant ethnic minorities." (SDSW Manual, § 22-203.3.)

that upon a request for fair hearing the county welfare authorities notify the referee of any language disability of the claimant (§ 22-023.23), and that at the hearing an interpreter be provided if necessary (§ 22-049.7).¹¹ Furthermore, we have noted herein that the state does print some of its welfare forms in Spanish, and that Los Angeles County welfare authorities make an effort to learn if a recipient is Spanish speaking only, and to assign a bilingual social worker in such cases.

Without citation of authority, plaintiffs contend that by so doing defendants have "embarked upon conduct" designed to create a "reasonable expectation" that all future communications with plaintiffs will be in the Spanish language—in other words, that defendants are somehow estopped to continue printing in English the notice here challenged. We do not agree. There is no showing that all or even a substantial portion of defendants' prior communications with plaintiffs were in fact in Spanish. In any event, we view these regulations and practices as good-faith efforts by defendants to do as much as can reasonably be done—within the limits of budget, staffing, and time—to insure that recipients who are not fluent in English are not deprived of their welfare rights solely because of their language handicap. These

¹¹Plaintiffs mistakenly rely, however, on a regulation (§ 22-021.2) which requires that the notice of the right to request a fair hearing be written "in language understandable" to the recipient. As the regulation does not say "in a language understandable" to that person, the word "language" is here used as a synonym for "English." Thus construed, the regulation means only that the notice in question must be phrased in a simple vocabulary and syntax easily understood by persons of limited education.

III

efforts are commendable, and we do not doubt they will continue and be expanded as it becomes feasible to do so. For the reasons stated herein, however, they are not compelled by constitutional command, and therefore do not give rise to the constitutional duty asserted by plaintiffs.

The order appealed from is affirmed.

Mosk, J.

We Concur:

Wright, C.J.

McComb, J.

Burke, J.

Sullivan, J.

Clark, J.

DISSENTING OPINION BY TOBRINER, J.

In very recent history various cultural subgroups in our society have demanded that they be accorded a legal status not inferior to that which has long been enjoyed by the dominant element. The minorities have attacked the symbols of discrimination, and, to a large extent, and rightly, have succeeded in demolishing them. The law has reflected the social pressure for equal treatment and afforded to the subgroups a new and more meaningful legal status.¹

One of the sensitive points of the relationship between the minority and the majority elements has

¹See Friedman, *A History of American Law* (1973) pp. 576-580.

been that of language. In many situations the subgroup has been imprisoned within the barrier of inability to communicate in the English language, and, because of that handicap has been denied fundamental rights. In this regard and in the establishment of the rights of minority groups, the decision of this court in *Castro v. State of California* (1970) 2 Cal.3d 223 marks an historic and memorable step forward.

In *Castro* we posed the question before us in the following terms: "In this case we are called upon to determine whether that portion of article II, section 1 of the California Constitution which conditions the right to vote upon an ability to read the English language is constitutional as applied to persons who, in all other respects qualified to vote, are literate in Spanish but not in English." (2 Cal.3d at p. 225.) We answered the query unequivocally: "... we have concluded that the challenged provision, as so applied, violates the equal protection clause of the Fourteenth Amendment and is, therefore, a constitutionally impermissible exercise of the state's power to regulate the franchise." (*Id.*) Our last words in that case were: "We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote." (*Id.*, at p. 243.)

In this case we deal with a more concrete and yet limited application of disqualification of members of a Spanish-speaking subgroup because of their exclusive knowledge of Spanish and corollary lack of knowledge of English. Here we do not encounter electoral disenfranchisement; we encounter, instead, disqualification from welfare benefits. The basis for that disqualification frames a narrow issue. When the administrators *know* the recipient speak Spanish only and when the administrators have *previously orally communicated* with the recipients in Spanish, can the administrators send notices of termination or reduction of benefits in *English*?

Aside from the belief by many social observers that such a practice is quite deplorable, we must weigh it in the scales of procedural due process. Procedural due process is not a matter of absolutes which permits of no distinctions between one situation and the next. Instead, in any particular case the right of the individual to procedural due process must be balanced against the legitimate interests and burdens of the state. We probe it here in light of those considerations.

In *Goldberg v. Kelly* (1970) 397 U.S. 254 the United States Supreme Court held that recipients of public assistance payments were entitled under procedural due process to an evidentiary hearing before the state may terminate those payments. Although the court did not specify the exact form and content of the termination notice in that situation it did declare that the recipient was entitled to "timely and ade-

quate notice" of a proposed termination. (*Id.* at pp. 267-268.)²

We said in *Sokol v. Public Utilities Commission* (1965) 65 Cal.2d 247, 254 "What is due process depends on circumstances. It varies with the subject matter and the necessities of the situation. (Holmes, J., in *Moyer v. Peabody* (1909) 212 U.S. 78, 84. . . .) Its content is a function of many variables, including the nature of the right affected, the degree of danger caused by the proscribed condition or activity, and the availability of prompt remedial measures."

I have pointed out on another occasion³ that a "cornerstone of the structure of due process of law is that the adjudication of a significant right must be 'preceded by notice and opportunity for hearing appropriate to the nature of the case.' (*Mullane v. Central Hanover Bank & Tr. Co.* (1950) 339 U.S. 306, 313 [94 L.Ed. 865, 873, 70 S.Ct. 652].) Accordingly, the courts have held that due process affords the affected

²The *Goldberg* court did not deal with the issue of whether welfare termination notices to Spanish-speaking recipients must be in that language; indeed, there is no indication that the question was before the court at all. The court did state, however, that the particular means of notice employed by the City of New York—a personal conference with a caseworker followed by a letter from a unit supervisor—were constitutionally adequate. (*Id.* at p. 268.) Although at least two of the 20 named plaintiffs in that case had Spanish surnames (*id.* at p. 256, fn. 2), the opinion does not reveal if any of the plaintiffs were literate only in Spanish. We cannot determine from the opinion whether the City of New York employed caseworkers fluent in Spanish to work with Spanish-speaking recipients or whether the city sent termination notices in Spanish to recipients it knew to be literate only in that language.

³In *re Tucker* (1971) 5 Cal.3d 171, 196 (Tobriner, J., concurring and dissenting).

individual a right to timely and adequate notice in criminal proceedings [citations], in civil proceedings [citations], in juvenile proceedings [citations] and in administrative proceedings [citations]. [1] The United States Supreme Court 'has consistently made plain that adequate and timely notice is the fulcrum of due process whatever the purposes of the proceeding. [Citations.] Notice is ordinarily the prerequisite to effective assertion of any constitutional or other rights; without it, vindication of those rights must be essentially fortuitous. So fundamental a protection can neither be spared here nor left to the "favor or grace" of state authorities.' [Citations.] In order to be constitutionally adequate and timely, notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' (*Mullane v. Central Hanover Bank & Tr. Co.* (1950) 339 U.S. 306, 314 [94 L.Ed. 865, 873]. . . .)"

In *Mullane* the Supreme Court further specified as to notice: "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected [citations], or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (*Mullane v. Central Hanover Bank & Tr. Co.* (1950) 339 U.S. 306, 315 [94 L.Ed. 865, 873].)

We submit, then, in sum, that procedural due process is not composed of weights of absolute quantities in the judicial scales but rather of relative counters in those scales; the issue turns on the relative importance of adequate notice to the welfare recipient and the corresponding burden to the departments in printing the notice in Spanish. We have pointed out that notice is the very essence of due process.

We need not labor the importance of the deprivation of notice to the recipient or the life and death aspect of welfare relief. As to the burden to the departments, the majority opinion is most helpful; the majority admit: "the state *does* print some of its welfare forms in Spanish." (Opn. *ante*, at p. 15.) (Emphasis added.) If some "forms" are *now* printed in Spanish it cannot be unduly burdensome to print the form of revocation or reduction in Spanish, particularly when the departments are expected to mail the forms only to those whom the departments *know* speak Spanish exclusively and to whom the departments have *previously communicated* orally in Spanish and to whom the departments recognize the importance of so doing.⁴

Since defendant departments have already seen fit to identify Spanish-speaking recipients who are illiterate in English, to assign caseworkers fluent in Spanish to those recipients, and to furnish welfare forms in Spanish, the burden on defendants of printing a single additional form in Spanish—the notice of

⁴See majority opinion, *ante*, page xxviii, footnote 10.

reduction or termination of benefits—would certainly be minimal. Indeed, every apologetic assertion as to that which the departments now do to communicate in Spanish is an argument that it is no great burden to do that which the Constitution requires. We therefore conclude that defendants' present method of notifying AFDC recipients known by defendants to be illiterate in English but literate in Spanish is unconstitutional under the Fourteenth Amendment.

Despite the fact that the departments would be exposed to so slight a burden by sending notices in Spanish but that the recipients would be subjected to so crucial a loss, and despite the fact the scales of procedural due process tip so heavily in favor of plaintiffs, defendants proffer two hypotheses of defense. First, they say it may be reasonably assumed that in any event, the recipients will get the notice translated. Second, an acceptance of plaintiffs' position would lead to a requirement that notices in *all* assistance programs be printed in *all* foreign languages!

As to the first defense, the majority conclude that "the government may reasonably assume that the non-English speaking individual will act promptly to obtain such assistance (in translation) when he receives the notice in question." (Opn. *ante*, at p. 9.) To postulate a "reasonable assumption" that recipients of the notice may seek out a translator is a far cry from finding that the notices *are* "reasonably certain to inform" a Spanish-speaking recipient of the reasons for the reduction or termination of his bene-

fits and of his right to a hearing. (See *Mullane v. Central Hanover Bank & Tr. Co.* (1950) 339 U.S. 306; 315.)

Two cogent reasons demonstrate why the method of notice employed here is not reasonably certain to inform persons illiterate in English. In the first place, the unwary recipient may not appreciate the need for a translation. Unlike the situation in *Goldberg v. Kelly* (1970) 397 U.S. 254, plaintiffs may not have had the benefit of a prior personal conference with a caseworker to inform them that reduction or termination of their benefits is in the offing. Moreover, since plaintiffs' personal dealings with defendants have been at least in part through Spanish-speaking caseworkers, and since defendants do print other welfare forms in Spanish, plaintiffs may have been led to believe the notice was simply not important enough to warrant an immediate translation.

Secondly, the recipient may be unable to obtain a translation at all; if he does obtain one, it may be too late to request a hearing within the prescribed 15-day period. The recipient may not be able to afford to pay for the services of translation. Even when free translation services are available, the recipient may lack the time or the transportation necessary to obtain them. In short, placing the burden on the *recipient* to obtain a translation of the notice employed by defendants is not reasonably calculated to apprise him of his right to request a hearing.

As to the second defense, the majority describe a *concursum horribilium* (*People v. Crowe* (1973) 8 Cal.

3d 815, 835 (Mosk, J. dissenting)), which they insist will attend our approval of plaintiffs' plea. According to the majority, the decision could not be limited to the AFDC program and the Spanish language, but would also apply to all categorical assistance programs and to all foreign languages. Next, the ruling would be extended to all official communications required to satisfy due process. Moreover, and the ultimate horror, the state would be required to conduct all its affairs in every language which is spoken by any person under its jurisdiction. Government would then grind to a halt, disabled by the need to perfectly inform its citizens.

The parade of horrors here, as so often, is no more than a retreat into the irrational. Surely we do not suggest that defendants would necessarily be required to furnish notices in Basque or Chippewa. We have explained in some detail that the application of procedural due process involves the weighing of the state's burden against the individual's benefit; in view of the fact that a *significant number* of California residents speak and read only Spanish and that defendants recognize this fact, since they have taken the commendable steps of providing Spanish-speaking caseworkers and of printing some forms in Spanish, the burden of printing the challenged forms in Spanish would be comparatively light.

Whether the expense and inconvenience of printing forms in other languages of the notices of reduction or termination of benefits would be justifiable must be decided in each case on the basis of the relevant facts.

The state knows which AFDC recipients read only Spanish; the state deals with a sufficient number of Spanish-speaking persons to justify the conclusion that printing notices in Spanish does not compose a special burden. Applying the same practical analysis the state need not print notices in Basque or Chipewewa because it does not know which recipients, if any, speak only those languages, and because there are so few of such recipients that the expense of translating and printing the notice would be unreasonable.

We conclude that individuals situated as the plaintiffs before us are constitutionally entitled to notice in Spanish before their welfare payments may be reduced or terminated because the due process protections afforded by such notice are significant while the burden upon the state in providing them is minimal. We reject the implication that such a holding would necessarily extend to other language groups or to all other government communications. Under a different set of circumstances, the balance of interests between individual and state may be entirely different and may accordingly dictate a different result.

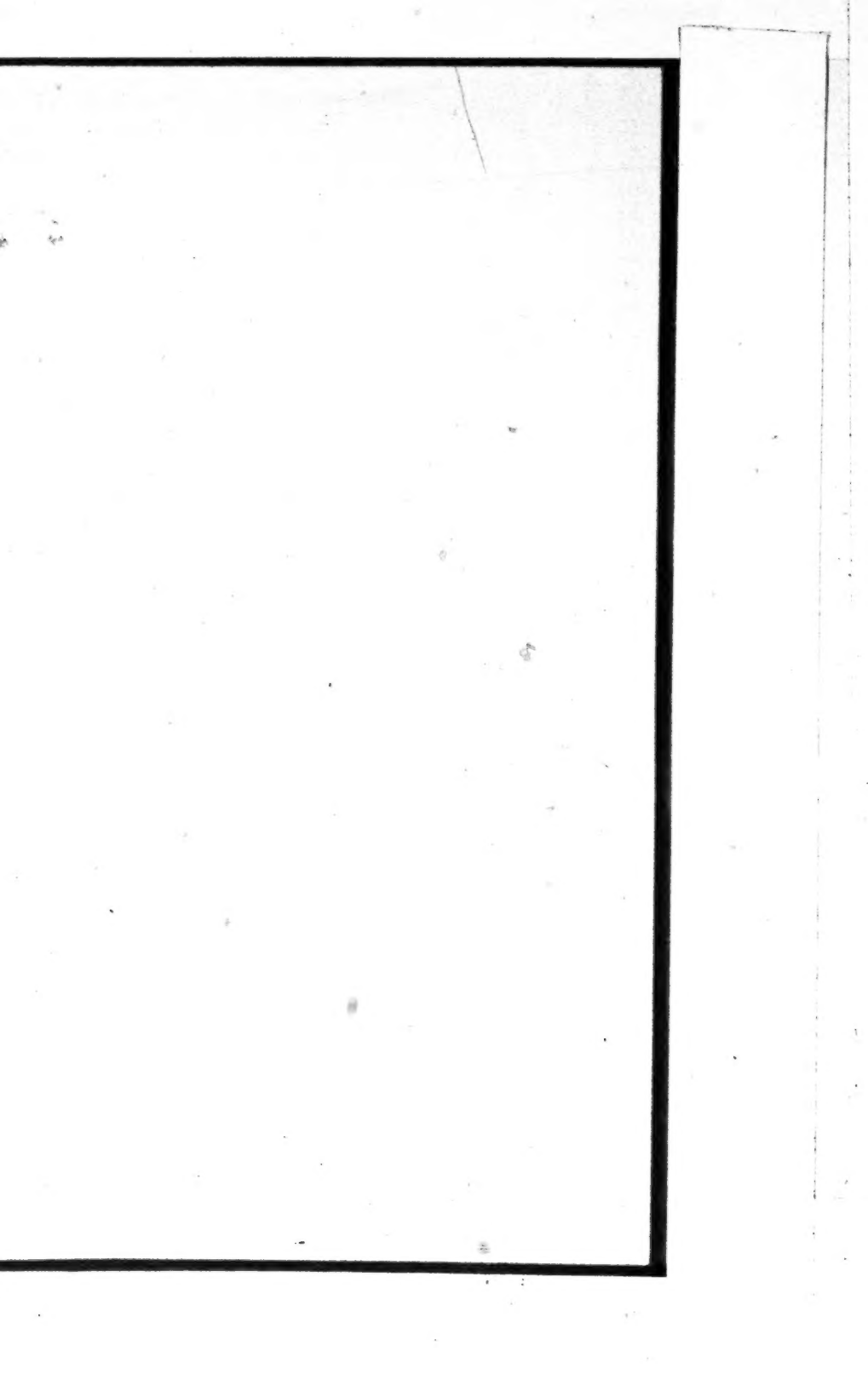
We subscribe to the majority's allusion to the enrichment of our cosmopolitan society by the immigration "of persons from many lands with their distinct linguistic and cultural heritages." (Opn. *ante*, at p. 14.) We would insist that those of that group who receive Aid to Families with Dependent Children are entitled to procedural due process as to reduction or termination of welfare benefits, notices which entail

a relatively slight burden to the state, but which are crucial to the recipients.

In the long effort of the subgroups in our culture to attain recognition and participation the majority opinion can only be an unfortunate step backwards.

I would reverse the judgment.

Tobriner, J.



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Miscellaneous:	
Andersson and Boyer, <i>Bilingual Schooling in the United States</i> , Vol. I (1970) ..	19, 24
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<i>Learning for Two Worlds</i> , 8 American Education 28 (Nov. 1972)	27
<i>Tucson's Tales of Two Cultures</i> , NEA Journal, Feb. 1967, p. 62	27

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU, ET AL., PETITIONERS

v.

ALAN H. NICHOLS, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, 2000d, and 2000h-2, with respect to denials of equal educational opportunity based on national origin, and we accordingly participated in this case in the court of appeals as *amicus curiae* in support of the petitioners, and filed a memorandum in this Court in support of the petition for a writ of certiorari. We have previously expressed the government's view that a school dis-

strict may be constitutionally required to provide programs to meet the special educational needs of racial or ethnic minority group children. See Memorandum for the United States as Amicus Curiae in *Keyes v. School District No. 1*, No. 71-507.¹

The holding of the court of appeals in this case that respondents' practices do not violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (App. 120-121, n. 6), is contrary to the administrative construction given Section 2000d by the Department of Health, Education, and Welfare (Pet. Br. App. 1a-3a). The outcome of this case may thus affect the government's enforcement responsibilities under federal law where federal financial assistance is extended to school districts attended by large numbers of national origin-minority group children.

STATEMENT

The essential facts in this case are not in dispute. English is the language of instruction in the public schools of San Francisco and is the native tongue of most of the students. There are, however, 2,856 Chinese-speaking students in the school district who do not speak or understand English. Some of these students (1,066) receive special help on a part-time or full-time basis.² But the rest (1,790), represented

¹ Because the case was decided on other grounds, the Court had no occasion to reach this issue.

² These students receive special help under the experimental "Chinese Bilingual Pilot Program" conducted by the school district (App. 38-39, 45). Nothing in the record indicates that the students who participate in this program

in this class action by petitioners, receive no assistance at all in learning the English language.

Consequently, while they are provided "the same facilities, textbooks, teachers and curriculum as is provided to other children in the district" (App. 128), they cannot read their textbooks, cannot understand their teachers, and cannot participate in classroom discussion. The result, as respondents themselves have stated, is that the non-English speaking child is "frustrated by [his] inability to understand the regular class work" (App. 101), performs poorly in school (App. 103), and "is almost inevitably doomed to be a dropout and become another unemployable in the ghetto" (App. 103-104).

Petitioners sought an injunction requiring the school district to provide them special instruction in English. They argued that respondents' failure to provide such instruction violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* The district court denied relief (App. 113-115), and the court of appeals affirmed, with one judge dissenting (App. 116-139). The court of appeals held that, because petitioners' lack of proficiency in the English language "was not caused directly or indirectly by any State action" (App. 127), respondents have no duty to provide special instruction in English.

are more in need of assistance or have greater ability to benefit from special instruction than the students in petitioners' class.

ARGUMENT

INTRODUCTION AND SUMMARY

The development of universal and compulsory education has led to the parallel development of legal principles to protect minority group children required to attend schools dominated by other racial, ethnic, or religious groups. See *Meyer v. Nebraska*, 262 U.S. 390; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624; *Abington School District v. Schempp*, 374 U.S. 203; *Brown v. Board of Education*, 347 U.S. 483; *Wisconsin v. Yoder*, 406 U.S. 205. In San Francisco, as in the United States generally, English is the dominant language, and the school authorities have chosen it as the language of instruction. While that seems a reasonable decision, its effect is to disadvantage a substantial number of children in the district who speak and understand only Chinese.

In our view, both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 impose upon the school authorities in such circumstances an obligation to provide some special instruction to national origin-minority group students within their district who do not have proficiency in the English language sufficient to allow them meaningfully to participate in the educational program which is readily accessible to their English-speaking classmates. Respondents' failure to provide such instruction means, for petitioners, "[d]enial of access to the dominant culture, [and] lack of

opportunity in any meaningful way to participate in political and other public activities * * *." *United States v. Jefferson County Board of Education*, 372 F. 2d 836, 866 (C.A. 5), affirmed on rehearing *en banc*, 380 F. 2d 385 (C.A. 5), certiorari denied *sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840.

The court below dismissed petitioners' claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, as though it were merely cumulative of the rights embodied in the Fourteenth Amendment's guarantee of equal protection. This disposition misconstrues the Act and ignores the regulations and guidelines adopted by the Department of Health, Education, and Welfare. Although intimately connected with equal protection guarantees, Title VI is grounded upon the right of the federal government to condition its grants of financial assistance with reasonable restrictions. HEW has determined—and its construction of the Act is "entitled to great weight" (*Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210)—that compliance with Title VI requires a school district to take affirmative steps to rectify the language deficiency of students where the deficiency "excludes national origin-minority group children from effective participation in the educational program offered by [the] school district" (Pet. Br. App. 1a-2a). Because the school district failed to take such steps here, petitioners are entitled to relief under Title VI regardless of the merit of their constitutional claim.

In our view, therefore, the Court need go no further; it may dispose of the case on the basis of the statute alone. We submit, however, that the court of appeals incorrectly decided the constitutional issue as well. It assumed, erroneously, that the school district's sole obligation under the equal protection clause is to provide for all its students the same facilities and curriculum, even though it is aware that a large and easily identifiable segment of non-English speaking students lacks the capacity to derive any educational benefit whatever from those facilities and curriculum. That narrow and mechanical view of equal educational opportunities cannot be reconciled with this Court's holdings in *Brown v. Board of Education*, *supra*, *Sweatt v. Painter*, 339 U.S. 629, and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637.

The State of California compels petitioners to attend school (Cal. Educ. Code § 12101); declares that its policy is to ensure the mastery of English by all pupils in the public schools (Cal. Educ. Code § 71); places certain disabilities on persons who do not communicate in or understand English (Cal. Civ. P. Code §§ 185 and 198(3)); and requires proficiency in the English language as a prerequisite to high school graduation (Cal. Educ. Code § 8573). In these circumstances, respondents' decision to deny petitioners any assistance in learning the language of instruction in the schools excludes them from the educational program because of a national origin-related characteristic, just as effectively as would a policy of barring them from the schoolhouse. This unequal

treatment, unless required by some compelling state interest, is a constitutionally impermissible act of *de jure* discrimination, from which petitioners are entitled to relief.

Respondents have suggested no state interest, compelling or otherwise, to justify the discriminatory treatment of Chinese-speaking students. Indeed, that practice defeats, rather than furthers, the State's established educational policy of educating all public school children and ensuring that all master the English language.

Granting relief in this case will not require the judiciary to substitute its judgment for that of the responsible local officials on questions of educational policy, nor will it imply that the nation's public schools must remedy every educational handicap or raise every student's learning skills to the level of the most proficient. The issue here is a narrower one. Respondents have established English as the language of instruction; they are aware that a large group of Chinese-origin children who are required to attend the schools cannot speak or understand English; and yet they have declined to make *any* effort to assist those children in learning English, even though there are practicable methods for doing so. Thus, the question is whether a school district may, consistent with the Fourteenth Amendment and its statutory obligations under Title VI, knowingly deprive a large ethnic minority of the minimal skills necessary to secure a basic education. The answer to that question is no.

**RESPONDENTS' FAILURE TO TEACH ENGLISH TO
PETITIONERS VIOLATES TITLE VI OF THE CIVIL
RIGHTS ACT OF 1964**

Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Respondents have selected English as the language of instruction in the San Francisco public schools, and they have refused to teach that language to a large number of Chinese-origin children who cannot understand English. That practice, we submit, violates the statute.

Requiring Chinese-speaking children to sit in classes conducted in a language they do not understand and to stare at textbooks they cannot read plainly has the prohibited effect of excluding them from participation in, denying them the benefits of, and subjecting them to discrimination under the school district's educational program. The impact of that practice is upon a distinct segment of a national origin-minority group, whose members are affected on account of a national origin characteristic. Since it is

undisputed that the San Francisco Unified School District receives federal financial assistance under a variety of programs (see App. 36-39), it follows that the failure to teach petitioners English violates Section 601.

This conclusion is fortified by the regulations and guidelines issued by the Department of Health, Education, and Welfare pursuant to Section 602 of the Act, 42 U.S.C. 2000d-1.^{*} The regulations specify (45 C.F.R. 80.3(b)(1)) that recipients of federal financial assistance under any program administered by HEW may not, on the ground of race, color, or national origin:

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

* * * *

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

* * * *

^{*} Section 602 provides in part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. * * *

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program * * *.

In programs for support of the operation of elementary or secondary schools, "discrimination by the recipient school district in any of its elementary or secondary schools * * * in the treatment of its students in any aspect of the educational process, is prohibited"; the prohibition includes "discrimination among the students * * * in the availability or use of any academic * * * or other facilities of the grantee or other recipient" (45 C.F.R. 80.5 (b)).

These prohibitions are not limited to affirmative acts that are designed to discriminate among the students on account of race or national origin; they embrace as well practices that have an impermissible *effect* regardless of the innocence of their design. Thus, in determining what benefits are to be provided under an HEW program of financial assistance, or what class of individuals is to be benefited, a recipient "may not * * * utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination * * *, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin" (45 C.F.R. 80.3(b)(2) (emphasis added)).

The challenged conduct has precisely those effects. Respondents' refusal to teach English to the Chinese speaking minority in effect deprives the members of that minority of access to a basic education. It thus violates the regulations in several ways: it provides to the Chinese-speaking minority benefits different from those provided to others under the district's educational program (45 C.F.R. 80.3(b)(1)(ii)); it restricts them in the enjoyment of the benefits enjoyed by the English-speaking majority (45 C.F.R. 80.3(b)(1)(iv)); it denies them a meaningful opportunity to participate in the district's educational program (45 C.F.R. 80.3(b)(1)(vi)); it discriminates against them in the educational process (45 C.F.R. 80.5(b), 80.3(b)(2)); and it defeats the objectives of the educational program as respects individuals of Chinese origin (45 C.F.R. 80.3(b)(2)).

The Department of Health, Education, and Welfare has, moreover, specifically construed the Act and the regulations to proscribe practices like those of respondents. In conducting Title VI compliance reviews pursuant to 45 C.F.R. 80.7, the HEW Office for Civil Rights found in 1970 that certain common practices by school districts were effectively denying equality of educational opportunities to national origin-minority group children with English language deficiencies. It accordingly issued, on July 10, 1970, a memorandum of guidelines designed to clarify its policy "concerning the responsibility of school districts to provide equal educational opportunity" to

such children (Pet. Br. App. 1a). The memorandum provides in part (*id.* at 1a-2a):

Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

The memorandum thus reflects a finding by the federal agency with special competence in the area of education that, where a school system employs English as the basic language of instruction but provides no special assistance to non-English speaking students who comprise a significant portion of the system's enrollment, those students are impermissibly excluded from participation in, denied the benefits of, and subjected to discrimination under the system's educational program, on account of their national origin. This "consistent administrative construction of the Act," like the Department's formal regulations, is "entitled to great weight." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210. See, also, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434; *Udall v. Tallman*, 380 U.S. 1. There is nothing in this record to contradict HEW's finding. Indeed, as we demonstrate below, the record fully supports that finding.⁴

⁴ Respondents are, moreover, obligated by contract to comply with both the regulations and the guidelines. In consideration of receiving federal financial assistance under programs ad-

Respondents' practices thus violate Section 601 on its face and as authoritatively construed by the pertinent federal agency. Petitioners are, in these circumstances, entitled to relief under the statute.⁵ The court of appeals, however, rejected their claim summarily, stating in a footnote (App. 120-121, n. 6) that Section 601 prohibits only "affirmative action by which a person is 'excluded' from participation, 'denied' the benefits, and 'subjected' to discrimination," and that the court's determination of petitioners' constitutional claim "will likewise dispose of the claims made under the Civil Rights Act." Both statements are incorrect.

First, the statute nowhere states or implies that it is meant to bar only affirmative acts of discrimination while permitting discrimination that results

ministered by HEW, the school district has contractually agreed to "comply with title VI of the Civil Rights Act of 1964 * * * and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 C.F.R. Part 80) issued pursuant to that title * * *," and "immediately [to] take any measures necessary to effectuate this agreement" (Pet. Br. App. 4a). The contract is binding and specifically enforceable. See *United States v. Sumter County School District*, 232 F. Supp. 945 (E.D. S.C.).

⁵ It is settled that petitioners, as representatives of the class of affected children, have standing to enforce Section 601, and that injunctive relief is an appropriate remedy. *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (C.A. 5), certiorari denied, 388 U.S. 911; *Natonabah v. Board of Education*, 355 F. Supp. 716, 724 (D. N.M.); *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582, 583-584 (N.D. Ill.).

from inaction. Indeed, Section 601 itself uses the passive voice. It does not provide that no person shall discriminate; it provides that no person shall suffer discrimination. As we have shown, the HEW regulations have properly construed the Act, consistent with the obvious legislative intent, to proscribe practices that have a discriminatory *effect*, regardless of their purpose and regardless whether the effect is the result of action or inaction.

But even if the court of appeals has correctly perceived a limitation not apparent on the face of the statute, it is difficult to see why respondents' practices would not be classified as "affirmative action." Although respondents are not responsible for petitioners' lack of English language skills, they have created the circumstances in which that lack of skill has become a crippling deficiency. In the context of state-wide laws compelling attendance at school (Cal. Educ. Code § 12101) and requiring proficiency in the English language as a condition of graduation from high school (Cal. Educ. Code § 8573), respondents' determination to teach only in English and to disregard those students who cannot understand English is an affirmative act of discrimination against the Chinese-speaking minority.

Finally, determination of the constitutional issue in this case need not control the disposition of the statutory question. Title VI, although written in equal protection terms, is neither dependent upon nor necessarily coincident with the Equal Protection Clause of the Fourteenth Amendment. Rather, it is

grounded on the general authority of the federal government to place reasonable restrictions upon the use of federal funds by the recipients.*

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.⁷

Thus, the applicability of Title VI here does not depend upon the outcome of the equal protection analysis. Pursuant to the power of Congress to "provide [in its expenditures] for the * * * general Welfare of the United States * * *" (U. S. Constitution, Art. I, Sec. 8, Cl. 1), enhanced like all other congressional powers by Article I's "necessary and proper" clause, the statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief.

* See *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143; *United States v. San Francisco*, 310 U.S. 16, 26; *United States v. Jefferson County Board of Education*, *supra*, 372 F.2d at 882; *United States v. Frazer*, 297 F. Supp. 319, 322 (M.D. Ala.).

⁷ 110 Cong. Rec. 6543, Senator Humphrey quoting from President Kennedy's message to Congress, June 19, 1963. See, also, 110 Cong. Rec. 1527-1528, 12675-12677, 13334, 13378, 13416.

II

RESPONDENTS' FAILURE TO TEACH ENGLISH TO PETITIONERS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE IT DEPRIVES AN EASILY IDENTIFIABLE NATIONAL ORIGIN-MINORITY GROUP OF THE BASIC EDUCATION PROVIDED TO THE ENGLISH SPEAKING MAJORITY

In our view, the Court may dispose of this case on the basis of the Civil Rights Act of 1964 and need not adjudicate petitioners' constitutional claim. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (Brandeis, J., concurring). If, however, the Court disagrees with our view of Title VI or prefers not to reach that issue, we submit that petitioners are in any event entitled to relief under the Equal Protection Clause of the Fourteenth Amendment.

A. Respondents' Action Is Subject to Strict Judicial Scrutiny Because It Classifies Students on the Basis of National Origin and Deprives the Disfavored Class of Access to a Basic Education

Respondents have chosen English as the language of instruction in the San Francisco public schools but have failed to make any provision for a substantial group of non-English speaking Chinese children. There can be no doubt that this is state action within the compass of the Fourteenth Amendment.

The issue is whether that state action creates a constitutionally impermissible classification.

1. *Respondents' practices have the effect of classifying the school district's students and of favoring one class over the other.*

The court of appeals reasoned that respondents have created no classification at all because they have provided all students with "the same facilities, textbooks, teachers and curriculum" (App. 128). In the court's view, since respondents have not caused petitioners' "language deficiency" (App. 127), they cannot be held responsible for petitioners' failure to derive any benefits from the educational program. We disagree.

As this Court has recognized, educational opportunity is not a function solely of buildings, books, and teachers: equal education means more than simply equal access to the material components of an educational program. It presupposes the student's basic capacity to communicate in and comprehend the language of instruction.

In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, the defendants provided a black graduate student with the same facilities and curriculum as white students but caused him to be segregated within those facilities from all other students. This Court rejected the argument, similar to that of the respondents here, that facilities and curricula are the sole measure of equal educational opportunity. "[E]ffective graduate instruction" was held to include an element of communication—the opportunity "to en-

gage in discussions and exchange views with other students" (*id.* at 641)—which was not susceptible of objective measurement. By depriving the black student of that opportunity, the defendants' practices impermissibly denied him an equal educational opportunity notwithstanding the appearance of objective equality.

Similarly, in *Sweatt v. Painter*, 339 U.S. 629, this Court held that the Fourteenth Amendment did not permit Texas to bar a black law student from the University of Texas Law School on account of his race, because the separate school for black students did not provide substantially equal facilities. The Court stated that, even "more important" than the obvious differences in faculty, library, and curriculum, "the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school" (*id.* at 634).

These intangible "considerations apply with added force to children in grade and high schools." *Brown v. Board of Education*, 347 U.S. 483, 494. In *Brown*, as in *McLaurin* and *Sweatt*, the Court rejected the argument that equality of educational opportunity can be measured solely in terms of "buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors" (*id.* at 492).

One intangible but indispensable element of an effective education is the student's ability to comprehend the language of instruction. That view, implicit in this Court's decision in *McLaurin*, is also shared

by educators.* When both the printed word and the spoken words of teacher and classmates are foreign to a student, he cannot make effective use of the tangible elements of an education. In circumstances such as those presented here, in which a substantial and identifiable national origin-minority group is known to lack even the elementary language skills necessary to comprehend classroom instruction, school officials cannot discharge their constitutional obligations merely by equalizing those tangible elements. For the effect of that "equalization" is to classify the students according to their English language skills and to disfavor the class whose members are incapable of benefiting from the instruction offered.

Respondents are aware that a large group of Chinese children in the San Francisco schools is unable to read, speak, or understand English (App. 101). They also recognize that, as a consequence of their failure to assist those students in learning English, many fail their courses, drop out of school, and become unemployable (App. 101, 103-104).⁵ In these

* It is generally accepted that education requires verbal interaction between teacher and student and must therefore take into account the language that the student understands. See Goodman, *Compulsory Mis-education*, p. 21 (1964); Butts and Cremin, *A History of Education in American Culture*, pp. 541-546, 566-567 (1953); Cubberley, *Public Education in the United States*, pp. 513-528 (1934); Bruner, *The Process of Education* (1963); Dewey, *Democracy and Education* (1916).

⁵ See also Andersson and Boyer, *Bilingual Schooling in the United States*, Vol. I, p. 48 (1970):

[Footnote continued on page 20]

circumstances, teaching all students in the same way denies an equal educational opportunity to the Chinese speaking minority.

The situation here is similar to that in *Yu Cong Eng v. Trinidad*, 271 U.S. 500. The Court there struck down as a denial of equal protection an Act of the Philippine Legislature making it an offense to keep business account books in any language other than English, Spanish, or a Filipino dialect.¹⁰ Though the Act appeared to treat all persons "equally," its effect would have been to drive out of business the Chinese merchants in the Islands, most of whom could not have complied with the Act. There, as here, the facially neutral policy invidiously discriminated against a substantial class of Chinese speaking persons whose language "deficiency" became a disability

* [Continued]

The non-English-speaking child who at the beginning of school is unable to acquire literacy in English in competition with his English-speaking classmates and who is not permitted to acquire it in his own language makes a poor beginning that he may never overcome. Frustrated and discouraged, he seeks the first opportunity to drop out of school; and if he finds a job at all it will be the lowest paying job. He will be laid off first, will remain unemployed longest, and is least able to adapt to changing occupational requirements.

¹⁰ The decision was based on the equal protection clause of the Philippine Bill of Rights, which extended to the Philippine Islands "guarantees equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment" (*Serra v. Mortiga*, 204 U.S. 470, 474). The Court accordingly applied "substantially the same criteria" that would be applied in a case arising under the Fourteenth Amendment (271 U.S. at 524).

as a result of that official policy.¹¹ It did not matter there, and should not matter here, that the government had not caused petitioners' language deficiencies. It was enough that it created the circumstances in which that deficiency became a disabling handicap.

2. *The classification—effectively singling out for less favored treatment non-English speaking children of Chinese origin—is constitutionally suspect.*

Respondents have, in effect, conditioned access to public education in San Francisco on a child's prior understanding of the English language. The class of those adversely affected includes nearly 1,800 children of Chinese ancestry who speak and understand only the language of their fatherland. The resulting classification is thus drawn along lines of national origin (cf. *Meyer v. Nebraska*, 262 U.S. 390, 398-399) and, under the decisions of this Court, is therefore "immediately suspect" and subject to "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216. See, also, *Oyama v. California*, 332 U.S. 633, 644-646; *Hirabayashi v. United States*, 320 U.S. 81, 100.¹²

¹¹ The Court there inferred that the Act was designed specifically to affect the Chinese merchants (271 U.S. at 514-515, 528). But it is not important that no such design is evident here. Under the equal protection clause, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect" (*Wright v. Council of the City of Emporia*, 407 U.S. 451, 462). "It is no consolation to an individual denied the equal protection of the laws that it was done in good faith" (*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725).

¹² Although respondents' practices may similarly affect other non-English speaking minorities in San Francisco, that pos-

The Chinese speaking minority in San Francisco bears each of "the traditional indicia of suspectness" that this Court identified in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28. It is "saddled with such disabilities, * * * subjected to such a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

The California Constitution of 1879, for example, barred "natives of China" from voting (Art. II § 1) and prohibited the employment of Chinese persons by the state, local governments, and corporations (Art. XIX, §§ 2-4). Later, an English literacy voting requirement was enacted by the legislature to exclude American-born children of Chinese immigrants. See *Castro v. State*, 2 Cal. 3d 223, 230, n. 11, 466 P. 2d 244, 248, n. 11. Until 1947, state legislation authorized the establishment of "separate schools * * * for children of Chinese, Japanese, or Mongolian parentage" (Cal. Educ. Code (1943 ed.) § 8003). See *Guey*

sibility does not alleviate the discriminatory impact on petitioners' class and is constitutionally immaterial. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22. See, also, *Takahashi v. Fish Commission*, 334 U.S. 410, 413; *Oyama v. California*, 332 U.S. 633, 646. Nor is the constitutionally suspect nature of this class altered by the fact that respondents have chosen to give some English language training to another, smaller group of Chinese speaking children. A classification based on race or natural origin is no less suspect merely because some or even many persons of that race or nationality are unaffected. See, e.g., *Phillips v. Martin Marietta Co.*, 400 U.S. 542; *Yu Cong Eng v. Trinidad*, *supra*, 271 U.S. at 512.

Heung Lee v. Johnson, 404 U.S. 1215 (per Douglas, Circuit Justice). San Francisco established such separate schools for Chinese-origin children. See *Wong Him v. Callahan*, 119 Fed. 381 (C.C. N.D. Cal.). Other legislation permitted local governments to adopt ordinances excluding Chinese persons from residence within their boundaries or requiring them to live within segregated areas. Ch. 29, 1880 Cal. Stats. 22. See, also, *Yick Wo v. Hopkins*, 118 U.S. 356.

In the context of this history of discrimination against the Chinese minority, respondents' choice of English as the language of instruction,¹⁹ coupled with

¹⁹ Respondents could have decided upon a multi-lingual curriculum. Although state law prior to 1967 required all schools to teach in the English language (Cal. Educ. Code (1943 ed.) § 8251), the statute now permits bilingual instruction (Cal. Educ. Code § 71). The California Bilingual Education Act of 1972 provides for financial assistance to school districts that wish to establish bilingual programs (Cal. Educ. Code § 5761, *et seq.*). Among the legislative findings recited in that Act (§ 5761) are these:

The inability to speak, read and comprehend English presents a formidable obstacle to classroom learning and participation which can be removed only by instruction and training in the pupils' dominant language.

* * * *

The Legislature finds and declares that a primary goal of such programs is, as effectively and efficiently as possible, to develop in each child fluency in English so that he may then be enrolled in the regular program in which English is the language of instruction.

Other states have also enacted statutes requiring or permitting bilingual programs. See 2C Ann. Laws of Mass., c. 71A, §§ 1-9 (mandatory in certain circumstances); Laws of the 63rd Legislature of the State of Texas, c. 392, p. 860;

their refusal to teach English to a large group of Chinese speaking children, creates an inherently suspect classification, the consequence of which, in contrast to the situation in *Rodriguez*, is that the members of petitioners' class suffer an "absolute deprivation of education" (411 U.S. at 25). The classification therefore calls for close judicial scrutiny; it can be justified only on a showing that it is necessary to accomplish a compelling state objective. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11; *McLaughlin v. Florida*, 379 U.S. 184, 192-193. The respondents cannot, and indeed have not even attempted to, make that showing here.

B. Respondents Have Not Shown That Their Action Is Required to Serve Any Compelling State Interest or Even That It Is Rationally Related to Any Legitimate State Purpose

Respondents have suggested no state interest, compelling or otherwise, that would justify the discriminatory effects of their policies on the Chinese speaking minority. Indeed, they have not even made the minimal showing required to support racially innocuous classifications—that "the challenged state action

Alaska Educ. Statutes, § 14.08.160 (mandatory in certain cases); 5A Kan. Stat. Ann., § 72-1101; 11 Me. Rev. Stat. Ann., Title 20, § 102(16); 2-A N.H. Rev. Stat. Ann., § 189-19; 11 N. Mex. Stat. Ann., § 77-11-12; 16 N.Y. Educ. Law, §§ 3204, 4404; Pa. Stat. Ann., Title 24, § 15-1511.

Indeed, foreign languages have historically been used as a medium of instruction in the public schools of the United States, particularly before the Civil War and before World War I. See, e.g., Andersson and Boyer, *Bilingual Schooling in the United States*, Vol. I, pp. 17, 35-36 (1970).

rationally furthers a legitimate state purpose or interest" (*Rodriguez, supra*, 411 U.S. at 55).

The court below stated that "the State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established" (App. 127). While that may justify the use of English, it plainly does not support respondents' refusal to teach English to petitioners, who are thereby denied the very "educational and socializing" benefits sought to be furthered.

Indeed, respondents' failure to assist petitioners in learning the language of instruction defeats rather than promotes California's educational program. The state requires petitioners to attend school (Cal. Educ. Code § 12101), declares that its policy is "to insure the mastery of English by all pupils in the schools" (Cal. Educ. Code § 71), and requires proficiency in the English language as a condition of high school graduation (Cal. Educ. Code § 8573). By establishing English as the language of instruction and refusing to teach that language to petitioners, respondents deprive a large ethnic minority of access to a basic education and thereby thwart the state's fundamental educational policies. The result is that "the State spites its own articulated goals" (*Stanley v. Illinois*, 405 U.S. 645, 653).

The discriminatory treatment of petitioners' class thus cannot withstand even minimal scrutiny, much less the "rigid scrutiny" (*Korematsu, supra*) required for racial classifications. Although this Court

has traditionally deferred to the school board's expertise in matters of local educational policy, that deference does not extend to policies which conflict with the Fourteenth Amendment's guarantees of equal protection. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Green v. County School Board of New Kent County*, 391 U.S. 430; *Brown v. Board of Education*, 349 U.S. 294 (*Brown II*). Such deference is even less appropriate where, as here, the school board's policy is itself in conflict with a broader state policy both to educate all children in the state and to insure their mastery of English. Cf. *Griffin v. County School Board*, 377 U.S. 218.

III

GRANTING RELIEF IN THIS CASE WILL NOT REQUIRE THE COURT TO FORMULATE LOCAL EDUCATIONAL POLICY AND WILL NOT MEAN THAT SCHOOL DISTRICTS MUST REMEDY EVERY EDUCATIONAL HANDICAP OF EVERY STUDENT

Granting relief to petitioners in this case need not lead the judiciary into "persistent and difficult questions of educational policy" (*Rodriguez, supra*, 411 U.S. at 42). The case presents no issue whether one form of instruction is preferable to another. It raises no question concerning the propriety of using English as the basic language of instruction in a public school system.

Petitioners seek only *some* form of reasonable assistance in comprehending the instruction offered to

them. Whether that assistance should be in the form of a bilingual curriculum rather than special training in the English language or some other program is for the informed judgment of the local school authorities," so long as a substantial effort is made. The only issue here is whether the school district may refuse to give any assistance at all to petitioners' class. Resolution of that issue does not require the Court to substitute its judgment for that of the responsible officials.

Nor will a decision in petitioners' favor imply that the nation's schools must give special assistance to every student with an educational deficiency or must seek to raise all students to the level of the most proficient. Those broad principles need not be invoked to resolve the statutory or constitutional issues in this case. The facts here are more limited.

Petitioners are required by state law to attend

¹⁴ We note that the district is authorized to offer a bilingual curriculum "when such instruction is educationally advantageous to the pupils" (Cal. Educ. Code § 71). The state, pursuant to the Bilingual Education Act of 1972 (Cal. Educ. Code § 5761, *et seq.*), provides financial assistance to school districts that wish to institute bilingual educational programs. See note 13, *supra*. Financial assistance is also made available to elementary school districts that "establish and maintain special programs or classes * * * in speaking, reading and writing the English language for foreign-born minors and native-born minors" (Cal. Educ. Code § 6061).

For discussion of examples of successful bilingual educational programs being conducted elsewhere, see *Learning for Two Worlds*, 8 American Education 28 (November 1972); *Tucson's Tale of Two Cultures*, NEA Journal, February 1967, p. 62.

school. Respondents have established English as the language of instruction in the San Francisco schools, and they are aware that a large group of Chinese children cannot comprehend that language. The state's articulated educational policy is to ensure mastery of English by all students, and to that end it offers financial assistance to school districts that establish programs to teach English to non-English speaking children. Respondents nevertheless have refused to provide *any* such assistance to petitioners' class. As a consequence, a large and easily identifiable ethnic minority, which has historically been subject to invidious discrimination in the California schools, has been denied access to even a basic education, on account of a language deficiency that is inextricably linked to national origin.

Whatever may be the result where a small or indistinct group is affected, or where the deficiency is not a racial or national origin characteristic, or where the students are not deprived of access to a basic education, on the facts presented in this case petitioners have been denied an equal educational opportunity and are entitled to relief under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded for the fashioning of appropriate relief.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

LAWRENCE G. WALLACE,
Deputy Solicitor General.

MARK L. EVANS,
Assistant to the Solicitor General.

BRIAN K. LANDSBERG,
MARIE E. KLIMESZ,
Attorneys.

OCTOBER 1973.

Syllabus
Opinion of the Court

LAU ET AL. v. NICHOLS ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 72-6520. Argued December 10, 1973—Decided January 21, 1974

The failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English, or to provide them with other adequate instructional procedures, denies them a meaningful opportunity to participate in the public educational program and thus violates § 601 of the Civil Rights Act of 1964, which bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance," and the implementing regulations of the Department of Health, Education, and Welfare. Pp. 565-569.

483 F. 2d 791, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the result, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 569. WHITE, J., concurred in the result. BLACKMUN, J., filed an opinion concurring in the result, in which BURGER, C. J., joined, *post*, p. 571.

Edward H. Steinman argued the cause for petitioners. With him on the briefs were Kenneth Hecht and David C. Moon.

Thomas M. O'Connor argued the cause for respondents. With him on the brief were George E. Krueger and Burk E. Delventhal.

Assistant Attorney General Pottinger argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were Solicitor General Bork, Deputy Solicitor General Wallace, Mark L. Evans, and Brian K. Landsberg.*

*Briefs of *amici curiae* urging reversal were filed by Stephen J. Pollak, Ralph J. Moore, Jr., David Rubin, and Peter T. Galiano for

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The San Francisco, California, school system was integrated in 1971 as a result of a federal court decree, 339 F. Supp. 1315. See *Lee v. Johnson*, 404 U.S. 1215. The District Court found that there are 2,856 students of Chinese ancestry in the school system who do not speak English. Of those who have that language deficiency, about 1,000 are given supplemental courses in the English language.¹ About 1,800, however, do not receive that instruction.

This class suit brought by non-English-speaking Chinese students against officials responsible for the operation of the San Francisco Unified School District seeks relief against the unequal educational opportunities, which are alleged to violate, *inter alia*, the Fourteenth Amendment. No specific remedy is urged upon us.

the National Education Assn. et al.; by W. Reece Bader and James R. Madison for the San Francisco Lawyers' Committee for Urban Affairs; by J. Harold Flannery for the Center for Law and Education, Harvard University; by Herbert Teitelbaum for the Puerto Rican Legal Defense and Education Fund, Inc.; by Mario G. Obledo, Sanford J. Rosen, Michael Mendelson, and Alan Exelrod for the Mexican American Legal Defense and Educational Fund et al.; by Samuel Rabinove, Joseph B. Robison, Arnold Forster, and Elliot C. Rothenberg for the American Jewish Committee et al.; by F. Raymond Marks for the Childhood and Government Project; by Martin Glick for Efraim Tortado et al.; and by the Chinese Consolidated Benevolent Assn. et al.

¹A report adopted by the Human Rights Commission of San Francisco and submitted to the Court by respondents after oral argument shows that, as of April 1973, there were 3,457 Chinese students in the school system who spoke little or no English. The document further showed 2,136 students enrolled in Chinese special instruction classes, but at least 429 of the enrollees were not Chinese but were included for ethnic balance. Thus, as of April 1973, no more than 1,707 of the 3,457 Chinese students needing special English instruction were receiving it.

Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

The District Court denied relief. The Court of Appeals affirmed, holding that there was no violation of the Equal Protection Clause of the Fourteenth Amendment or of § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, which excludes from participation in federal financial assistance, recipients of aid which discriminate against racial groups, 483 F. 2d 791. One judge dissented. A hearing en banc was denied, two judges dissenting. *Id.*, at 805.

We granted the petition for certiorari because of the public importance of the question presented, 412 U. S. 938.

The Court of Appeals reasoned that "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system," 483 F. 2d, at 797. Yet in our view the case may not be so easily decided. This is a public school system of California and § 71 of the California Education Code states that "English shall be the basic language of instruction in all schools." That section permits a school district to determine "when and under what circumstances instruction may be given bilingually." That section also states as "the policy of the state" to insure "the mastery of English by all pupils in the schools." And bilingual instruction is authorized "to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language."

Moreover, § 8573 of the Education Code provides that no pupil shall receive a diploma of graduation from grade 12 who has not met the standards of proficiency in "English," as well as other prescribed subjects. Moreover, by § 12101 of the Education Code children between the ages of six and 16 years are (with exceptions not material here) "subject to compulsory full-time education." (Supp. 1973.)

Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964, 42 U. S. C. § 2000d to reverse the Court of Appeals.

That section bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." The school district involved in this litigation receives large amounts of federal financial assistance. The Department of Health, Education, and Welfare (HEW), which has authority to promulgate regulations prohibiting discrimination in federally assisted school systems, 42 U. S. C. § 2000d-1, in 1968 issued one guideline that "[s]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the

opportunity to obtain the education generally obtained by other students in the system." 33 Fed. Reg. 4956. In 1970 HEW made the guidelines more specific, requiring school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to students who had "linguistic deficiencies," 35 Fed. Reg. 11595.

By § 602 of the Act HEW is authorized to issue rules, regulations, and orders* to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with § 601. HEW's regulations, 45 CFR § 80.3 (b)(1), specify that the recipients may not:

"(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

"(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program."

Discrimination among students on account of race or national origin that is prohibited includes "discrimination . . . in the availability or use of any academic . . . or

* Section 602 provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ." 42 U. S. C. § 2000d-1.

other facilities of the grantee or other recipient." *Id.*, § 80.5 (b).

Discrimination is barred which has that effect even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." *Id.*, § 80.3 (b) (2).

It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations.^{*} In 1970 HEW issued clarifying guidelines, 35 Fed. Reg. 11595, which include the following:

"Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

"Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track."

Respondent school district contractually agreed to "comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the

^{*} And see Report of the Human Rights Commission of San Francisco, Bilingual Education in the San Francisco Public Schools, Aug. 9, 1973.

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STEWART, J., concurring in result

Regulation" of HEW (45 CFR pt. 80) which are "issued pursuant to that title..." and also immediately to "take any measures necessary to effectuate this agreement." The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. *Oklahoma v. CSC*, 330 U. S. 127, 142-143. Whatever may be the limits of that power, *Steward Machine Co. v. Davis*, 301 U. S. 548, 590 *et seq.*, they have not been reached here. Senator Humphrey, during the floor debates on the Civil Rights Act of 1964, said: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

We accordingly reverse the judgment of the Court of Appeals and remand the case for the fashioning of appropriate relief.

Reversed and remanded.

MR. JUSTICE WHITE concurs in the result.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the result.

It is uncontested that more than 2,800 school children of Chinese ancestry attend school in the San Francisco Unified School District system even though they do not speak, understand, read, or write the English language, and that as to some 1,800 of these pupils the respondent school authorities have taken no significant steps to deal with this language deficiency. The petitioners do not contend, however, that the respondents have affirmatively or intentionally contributed to this inadequacy, but only

*110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

that they have failed to act in the face of changing social and linguistic patterns. Because of this laissez-faire attitude on the part of the school administrators, it is not entirely clear that § 601 of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, standing alone, would render illegal the expenditure of federal funds on these schools. For that section provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

On the other hand, the interpretive guidelines published by the Office for Civil Rights of the Department of Health, Education, and Welfare in 1970, 35 Fed. Reg. 11595, clearly indicate that affirmative efforts to give special training for non-English-speaking pupils are required by Tit. VI as a condition to receipt of federal aid to public schools:

"Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11595.

¹ These guidelines were issued in further clarification of the Department's position as stated in its regulations issued to implement Tit. VI, 45 CFR pt. 80. The regulations provide in part that no recipient of federal financial assistance administered by HEW may

"Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; [or]

"Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program."

45 CFR § 80.3 (b) (1) (ii), (iv).

The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601.² Last Term, in *Mourning v. Family Publications Service, Inc.*, 411 U. S. 356, 369, we held that the validity of a regulation promulgated under a general authorization provision such as § 602 of Tit. VI "will be sustained so long as it is reasonably related to the purposes of the enabling legislation." *Thorpe v. Housing Authority of the City of Durham*, 393 U. S. 268, 280-281 (1969).³ I think the guidelines here fairly meet that test. Moreover, in assessing the purposes of remedial legislation we have found that departmental regulations and "consistent administrative construction" are "entitled to great weight." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U. S. 205, 210; *Griggs v. Duke Power Co.*, 401 U. S. 424, 433-434; *Udall v. Tallman*, 380 U. S. 1. The Department has reasonably and consistently interpreted § 601 to require affirmative remedial efforts to give special attention to linguistically deprived children.

For these reasons I concur in the result reached by the Court.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the result.

I join MR. JUSTICE STEWART's opinion and thus I, too, concur in the result. Against the possibility that the Court's judgment may be interpreted too broadly, I

² The respondents do not contest the standing of the petitioners to sue as beneficiaries of the federal funding contract between the Department of Health, Education, and Welfare and the San Francisco Unified School District.

³ Section 602, 42 U. S. C. § 2000d-1, provides in pertinent part: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way

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stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because they cannot understand the language of the classroom. We may only guess as to why they have had no exposure to English in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience.

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guideline require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ."

The United States as *amicus curiae* asserts in its brief, and the respondents appear to concede, that the guidelines were issued pursuant to § 602.